

100TH CONGRESS }
1st Session

SENATE

{ REPORT
100-123

INDEPENDENT COUNSEL REAUTHORIZATION
ACT OF 1987

R E P O R T

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

together with

ADDITIONAL VIEWS

TO ACCOMPANY

S. 1293

TO AMEND THE ETHICS IN GOVERNMENT ACT OF 1978 TO PRO-
VIDE A CONTINUING AUTHORIZATION FOR INDEPENDENT
COUNSEL AND FOR OTHER PURPOSES



JULY 24, (legislative day, JUNE 23), 1987.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE

91-010

WASHINGTON : 1987

5403-4

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INDEPENDENT COUNSEL REAUTHORIZATION ACT OF 1987

JULY 24 (legislative day, JUNE 23), 1987.—Ordered to be printed

Mr. GLENN, from the Committee on Governmental Affairs,
submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 1293]

The Committee on Governmental Affairs, to which was referred the bill (S. 1293) to amend the Ethics in Government Act of 1978 to provide a continuing authorization for independent counsel and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

I. PURPOSE

The purpose of S. 1293, the Independent Counsel Reauthorization Act of 1987, is to amend the Ethics in Government Act to provide a continuing authorization for the independent counsel process and to clarify and strengthen the provisions governing that process.

II. BACKGROUND

A. HISTORY OF THE INDEPENDENT COUNSEL STATUTE

Legislation establishing the independent counsel process was first enacted by Congress in 1978, after the Watergate scandal, as Title VI, 28 U.S.C. 591-98, of the Ethics in Government Act, Public Law 95-521.

The Ethics in Government Act seeks to preserve and promote public confidence in the integrity of the federal government by,

inter alia, establishing procedures for financial disclosure by top officials, imposing outside earnings and postemployment restrictions on government employees, and creating a government-wide office to monitor agency ethics programs. Title VI of the Act establishes a system for "independent counsels" to investigate and prosecute allegations of criminal wrongdoing by officials who are close to the President. The purpose of this system is to ensure fair and impartial criminal proceedings when an Administration attempts the delicate task of investigating its own top officials.

A primary impetus for the independent counsel statute was the 1973 order by President Nixon to the Department of Justice to fire Archibald Cox, a "special prosecutor" who had been appointed by the President from outside the government to investigate the criminal allegations known as Watergate involving such officials as the President's Chief of Staff and Attorney General.

The order to fire Mr. Cox apparently arose from his refusal to obey earlier Presidential directives that he halt his efforts to obtain tape recordings and other records in the President's possession. Elliot Richardson, then Attorney General, and William French Smith, then Deputy Attorney General, resigned rather than fire Mr. Cox; Robert Bork, then Solicitor General, issued the desired order. The abrupt departure of Messrs. Cox, Richardson, and French Smith from the Department of Justice was later described by the press as the "Saturday Night Massacre."

These and later events led Congress to conclude that the federal government needed to establish a new process for investigating and prosecuting top officials suspected of criminal conduct. After lengthy debate, Congress decided upon a system of temporary, outside counsels who were appointed by a special court and who could be fired by the President only for good cause. This system was the foundation for the independent counsel provisions in the Ethics in Government Act.

Congress originally enacted the independent counsel statute with a five-year expiration date. Accordingly, in 1982, Congress reconsidered the provisions. At that time, a total of 11 independent counsel cases had been described in filings with the special court by the Department of Justice, involving officials in the administrations of Presidents Carter and Reagan.¹ An investigation by the Senate Subcommittee on Oversight of Government Management, then under the leadership of Senator William S. Cohen, led the Governmental Affairs Committee to conclude that the statute had created an effective system for investigating government officials but also that it was too easily triggered, causing, in at least two instances, criminal investigations which would not have taken place if the subjects had been private citizens.

The Committee recommended language to increase the discretion of the Attorney General over the initiation of independent counsel proceedings to prevent investigations of government officials which would not take place if these persons were private citizens; similar

¹ A twelfth case was filed with the court during 1982, after Congress' inquiry into the statute had begun. These totals do not include cases handled by the Department of Justice which did not get to the preliminary investigation stage (and therefore did not result in a filing with the special court).

language was ultimately adopted by Congress. The Committee also suggested reducing the number of officials covered by the statute and other adjustments to the statutory scheme. With these changes, Congress reauthorized the independent counsel statute with another 5-year sunset provision.

On January 3, 1983, President Reagan signed the bill into law. The independent counsel statute is currently due to expire on January 2, 1988, unless reauthorized by Congress once more.

B. OPERATION OF THE STATUTE

The independent counsel statute is triggered when the Attorney General receives information that a person covered by the statute may have engaged in criminal conduct other than a petty offense. Covered officials include the President and Vice President, Cabinet officers, top officials in the White House and Justice Department, senior officers in campaigns to elect or re-elect the President, and any person whose investigation by the Attorney General, rather than by an independent counsel, may result in a conflict of interest.

Upon receiving information under the statute, the Attorney General must review it to determine whether it constitutes "grounds to investigate" the person involved. In making this determination, the factors which may be considered are the specificity of the information and the credibility of the source for the information. If the Attorney General finds that the information is specific and from a credible source, the statute requires the Attorney General to initiate a "preliminary investigation" in the case.

During the preliminary investigation, the Attorney General is prohibited from convening a grand jury, issuing subpoenas or using certain other investigative tools. These restrictions are designed to ensure that the Attorney General's role in the case is a limited one, confined to determining the need for an independent counsel to look into the matter.

Upon completing the preliminary investigation or in no event later than 90 days from the date the information was received by the Justice Department, the Attorney General must file a report with the Independent Counsel Division of the U.S. Court of Appeals for the District of Columbia ("special court"), declining or requesting the appointment of an independent counsel. The statute states that the Attorney General may decline to request an independent counsel only upon determining that there are "no reasonable grounds to believe that further investigation or prosecution is warranted" in the case. If there are "reasonable grounds to believe that further investigation or prosecution is warranted" or if the Attorney General fails to make a determination either way within 90 days of receiving the information in the case, the statute requires the Attorney General to proceed and request appointment of an independent counsel. 28 U.S.C. 592.

Anyone may present specific and credible information to the Attorney General to trigger proceedings under the statute. The statute also provides that a majority of either political party's members on the House or Senate Judiciary Committee may submit a request to the Attorney General for the appointment of an independ-

ent counsel. In this event, the Attorney General must respond to the Committee in writing, describing what actions have been taken with respect to the matter and, if appropriate, why the Department declines to request an independent counsel.

When an Attorney General submits a request for the appointment of an independent counsel, the special court must comply by selecting an appropriate individual and defining the prosecutorial jurisdiction for the investigation. The special court consists of three Article III judges who have been designated to serve on the panel by the Chief Justice of the United States Supreme Court.

After appointment, the independent counsel assumes "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice," except with respect to wiretaps. 28 U.S.C. 594. This includes the power to convene grand juries, grant immunity to witnesses, issue indictments and "[handle] all aspects of any case." *Id.*

Independent counsels who receive or uncover information about possible criminal conduct which is "related" to their prosecutorial jurisdiction may ask the Attorney General or the special court for expanded jurisdiction to investigate this matter. They can also accept referral of related matters from the Attorney General. They must cooperate with congressional committees conducting oversight functions and report to Congress on their activities. At the conclusion of an investigation, they must file a final report with the special court, describing the work done, the disposition of the case, and the reasons for not prosecuting any matter.

Independent counsels may be removed from office by the Attorney General "for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of the such independent counsel's duties." 28 U.S.C. 596. In the event of such a removal from office, an independent counsel may obtain judicial review of the decision for removal.

The above statutory scheme creates two distinct stages in the independent counsel process. The first stage consists of the Attorney General's review of information to determine the need for an independent counsel in a particular case. The second stage arises only after the Attorney General has decided to request an independent counsel; it consists of the appointed persons's investigation and prosecution of the case.

C. SENATE OVERSIGHT SUBCOMMITTEE INVESTIGATION

Due to the nearing expiration date in the independent counsel statute, the Subcommittee on Oversight of Government Management, under the chairmanship of Senator Carl Levin, has examined the statute's implementation and effectiveness since its reauthorization in 1982.

Over the course of six months, Subcommittee staff interviewed current and former employees of the Department of Justice, persons associated with the special court, current and former independent counsels, and other persons knowledgeable about the statute. Hundreds of pages of documents were also reviewed. Two days

of hearings were held on March 19 and 20, 1987, followed by post-hearing questions and answers.

On the basis of the Subcommittee's research and analysis, the Governmental Affairs Committee has concluded that the independent counsel process has served the country well but that clarifying and strengthening amendments to the underlying statute are needed to resolve a variety of potential and actual problems.

(1) Overall Evaluations of the Statute

In preparation for the March hearings, the Oversight Subcommittee solicited the opinion of a number of individuals and organizations regarding the overall effectiveness and value of the independent counsel statute.

Key organizations and experts expressed their strong support for the independent counsel process. The American Bar Association stated that, based upon 15 years of research and careful study of the issue:

[T]he ABA is convinced that it is imperative for the administration of justice and the continued public confidence in the fairness of our system of justice that the Congress reauthorize the independent counsel provisions of the Ethics in Government Act. . . . [T]he independent counsel provisions . . . are fully consistent with the letter and spirit of the Constitution. . . . [T]he basic mechanism of the independent counsel law is soundly conceived and has functioned effectively since its passage in 1978 and its re-enactment in 1982.

Archibald Cox, former special prosecutor in the Watergate matter, testified on behalf of himself and Common Cause that the law is "essential to preserving public confidence in the fair and ethical behavior of public officials." Alan Morrison, an expert in the constitutional doctrine of separation of powers, explained in detail why the statute meets the requirements of the Constitution. Former Attorney General Benjamin Civiletti spoke in favor of reauthorization, and Lloyd Cutler, former counselor to President Carter and advocate of the 1978 law, favored reauthorization because the "system that is currently in place has worked fairly and has successfully enhanced public confidence."

Opponents of the independent counsel process primarily expressed concerns about the constitutionality of the statute. The Department of Justice testified at the March hearing that it had "grave doubts" about the statute's constitutionality. In June, the Department announced it would recommend a Presidential veto of any bill reauthorizing the independent counsel process, because of concerns about its constitutionality and the lack of accountability of independent counsels. Former Attorney General William French Smith stated that the statute is "cruel and devastating in its application to individuals . . . has been used more for political purposes and media appetite than to achieve justice, has been a nightmare to administer, and has caused a needless and substantial waste of taxpayers' money."

The Committee has found the arguments of the Department of Justice, Mr. Smith and other critics of the independent counsel statute to be unpersuasive, based upon an examination of the law's effective operation since 1982 and other expert analyses of the constitutional issues, including recent findings by three courts that the statute is likely to withstand constitutional scrutiny.

(2) Operation of the Statute Since 1982

There have been a number of important developments related to independent counsel proceedings since 1982. Although the number of cases handled under the statute has remained essentially the same as in prior years, activity has increased because more of the cases have resulted in requests by the Department of Justice for the appointment of independent counsels.

The Department of Justice, in response to written questions from the Oversight Subcommittee, reported processing a total of 36 cases under the independent counsel statute since 1982.² This means that the Department has handled these cases at an average of about seven per year.

Cases Closed Prior to Preliminary Investigation.—Of the 36 cases under the statute, the Department reported closing 25, or more than two-thirds of them, prior to conducting the preliminary investigation specified in the law. It reported closing five of these cases because the allegations did not involve a covered official, and 20 others (which did involve a covered official) because a "threshold inquiry" had determined that the information was insufficient to trigger a preliminary investigation.

In the 20 cases involving covered officials, the Department reported spending an average of approximately 75 days before closing the case. The majority of the 75 days was apparently spent in conducting the "threshold inquiry" in each case, evaluating whether the information was sufficient to trigger a preliminary investigation—in other words, whether it was specific and from a credible source.

The Department does not clearly articulate why, in the 20 cases on covered officials, it found the information insufficient to trigger a preliminary investigation. From materials supplied by the Department, it appears that the Department closed 3 or 4 of the cases primarily because it determined that the source of the information was not credible; 2 of the cases primarily because the allegations were not specific; and 3 or 4 of the cases due to a mixture of these two factors.³

² In addition, since 1982, private citizens have asked courts to order proceedings under the independent counsel statute in twelve cases. In nine of these twelve cases, the petitioners had not presented their information first to the Justice Department, and their pleadings were dismissed. In the remaining three cases, the petitioners had presented their information to the Justice Department but had been told that no preliminary investigations would be initiated. The petitioners were appealing the Department's refusal to proceed. In each of the three cases, a federal appeals court reversed a lower court decision and held that judicial review was not available of an Attorney General's decision to terminate proceedings under the independent counsel statute.

³ In one other case, the Department reported declining to conduct a preliminary investigation but also continuing its efforts to substantiate the "specific" allegations it has received and to evaluate the credibility of the source.

It appears the Department closed the remaining 10 cases, despite receiving specific information from a credible source of possible wrongdoing, because it determined that the evidence available did not establish a "crime." In at least 5 of these 10 cases, this decision appears to be based, in whole or in part, upon a finding that there was insufficient evidence of a subject's criminal intent and therefore no "crime" to investigate.

Thus, contrary to the statutory standard, in 50% of the cases handled by the Justice Department since 1982 in which it declined to conduct a preliminary investigation of a covered official, it relied on factors other than credibility and specificity to evaluate the case. Moreover, in at least half of these cases, the Department of Justice refused to conduct a preliminary investigation into the alleged misconduct, because it had determined there was, at this early stage in the process, insufficient evidence of criminal intent.

Cases In Which Preliminary Investigations Were Conducted.—The Justice Department reported conducting preliminary investigations in 11 of the 36 cases under the independent counsel statute. Eight of these cases resulted in the appointment of an independent counsel.⁴ The other three cases, involving Ambassador Faith Ryan Whittlesey, former Deputy Attorney General Edward Schmults and former Assistant Attorney General Carol Dinkins, were closed without the appointment of an independent counsel. In each of the three cases that were closed, the decision not to proceed under the statute was based, in whole or in part, upon a finding that the evidence did not establish the subject's criminal intent.

In the five years since 1982, only 8 cases, or less than one fourth of the total caseload, have resulted in the Department of Justice's request for the appointment of an independent counsel. A list of these eight cases, with their current status, is as follows:

- (1) Edwin Meese, III, then Counselor to the President (case closed without indictment);
- (2) Theodore Olson, then Assistant Attorney General (case ongoing);
- (3) Michael Deaver, then Chief of Staff and Assistant to the President (indictment filed);
- (4) Iran/Contra matter (two convictions, case ongoing);
- (5) Franklyn Nofziger, then Assistant to the President (indictment filed);
- (6) Edwin Meese, III, Attorney General (joined with *In re Nofziger*, case ongoing); and
- (7-8) two other individuals (cases presumably ongoing).

Over the last five years, the Department also granted one request by a sitting independent counsel to expand her prosecutorial jurisdiction. In that case, Attorney General Meese granted a request by independent counsel Alexia Morrison to expand her inquiry in *In re Olson* to include an investigation of the conduct of Robert Perry, former general counsel to the Environmental Protection Agency (EPA).

⁴ In comparison, during the period 1978 to 1982, the Justice Department conducted preliminary investigations in 12 cases and requested the appointment of an independent counsel in three of them.

In that same case, however, Attorney General Meese denied Ms. Morrison's request to investigate two other persons, Edward Schmults and Carol Dinkins. He had declined to authorize the investigation of these individuals when he originally requested an independent counsel to examine Mr. Olson's conduct, and rejected Ms. Morrison's argument that new information warranted their inclusion in the case. After receiving the Attorney General's decision, Ms. Morrison presented the same request to investigate Mr. Schmults and Ms. Dinkins to the special court. On April 2, 1987, the special court ruled that it had no authority to grant a request for expanded jurisdiction to conduct an investigation which the Attorney General had twice refused to authorize. This ruling resolved a major ambiguity in the statute and dramatically reduced the potential authority of the court to grant requests for expanded jurisdiction.

Over the past five years of the statute's operation, several other milestones also took place: the first indictment under the statute, filed in *In re Deaver*, and the first convictions under the statute, through guilty pleas obtained in *In re Iran/Contra*. There were also legal challenges to the statute's constitutionality in these cases, lodged by Mr. Deaver and Lt. Col. Oliver North. Numerous briefs filed by *amicus curiae*, including the Senate, House of Representatives and American Bar Association, argued in favor of the statute, and the lower court judges considering the matter have so far indicated the statute is likely to withstand constitutional scrutiny. The legal challenges are ongoing, however, and may eventually reach the Supreme Court.

The activity under the independent counsel statute allowed the Oversight Subcommittee to conduct a wide-ranging review of various aspects of the statute's operation. After examining the Subcommittee's analysis of the statute as well as other matters, the Committee finds that the independent counsel provides an effective and essential procedure to investigate persons close to the President. It also finds, once more, that the statute meets the requirements of the Constitution. In addition to these findings, the Committee has identified several potential and actual problems with the statute which would benefit from legislative solutions, including changes to render the statute's constitutional status even clearer.

(3) Problems Needing Correction

The problems identified by the Committee are associated with the actions of the Department of Justice, the special court and the independent counsels in implementing the statute. They encompass both stages in the independent counsel process: (1) the initial review of a case by the Department of Justice to determine the need for an independent counsel, and (2) if necessary, the appointment of an independent counsel by the special court, followed by that independent counsel's investigation and prosecution of the case.

Department of Justice Procedures

Some of the most serious implementation problems identified by the Committee concern the Justice Department's procedures for handling cases under the statute.

Threshold Inquiries.—One such problem is the Department's practice of conducting lengthy "threshold inquiries" to determine whether information received in a case is sufficient to trigger a preliminary investigation. In some cases, these inquiries have lasted months, involved elaborate factual and legal analyses, and resulted in the termination of further proceedings under the statute.

For example, in a case involving Ambassador Faith Ryan Whittlesey, the Department of Justice conducted a six-week "threshold inquiry" in which two government attorneys traveled to Switzerland, France and throughout the United States, conducted approximately 50 interviews and extensive document reviews, and apparently performed complex factual and legal analysis described in the *In re Whittlesey* report. On the basis of this inquiry, the Attorney General determined that no "preliminary investigation" under the statute was required. However, as Archibald Cox observed at a Senate hearing, the Attorney General had already done "everything" necessary in the case "to conduct a preliminary investigation except put that name on it."

It is not clear why the Department of Justice has adopted this practice. Some have suggested that the Department is conducting preliminary investigations in all but name to avoid statutory reporting requirements that attach only after a "preliminary investigation" has taken place. Since these reporting requirements are the primary means of ensuring the Attorney General's accountability for decisions not to proceed under the statute, Congress intended them to attach in all but frivolous cases. Accordingly, witnesses advocated a variety of amendments to the statute to prevent the Department from avoiding the reporting requirements.

90-Day Deadline.—A second problem identified by the Committee concerns the calculation of the 90-day deadline for preliminary investigations. Congress has always intended that the Department of Justice play a limited role in the independent counsel process, consisting primarily of an expeditious review of each case to determine whether an independent counsel is needed to look into the matter. Congress therefore placed an overall limit on the time that the Department could spend examining a case and deciding whether to decline or request the appointment of the independent counsel.

The primary mechanism selected by Congress to enforce this time limit is an instruction that, upon receiving information under the statute, the Attorney General shall conduct a preliminary investigation of that information for a period not to exceed 90 days. (A single extension of time, for good cause, may also be obtained). Moreover, to prevent indecision or inaction from delaying proceedings under the statute, the statute states that, in the event 90 days "elapse from the receipt of the information" in a case without a decision on the need for an independent counsel, the Attorney General must go forward under the statute and request an independent counsel. This language, in 28 U.S.C. 592(c)(1), imposes an overall 90-

day cap on the Attorney General's initial role in an independent counsel case, dating from the time the Department of Justice first receives the information about alleged wrongdoing.

Despite the plain language in section 592(c)(1), the Attorney General has interpreted the statute in a way which essentially eviscerates the 90-day deadline. Rather than calculating the deadline from the date information is first received in a case, the Justice Department contends that the 90-day period begins to run only after the Attorney General has "personally" determined that a preliminary investigation is warranted in that case. (Letter of March 13, 1987, from the Department of Justice to the Oversight Subcommittee, at page 6.)

This interpretation of the statute creates several problems. First, it relies on a starting date for the 90-day period which is less certain and more subjective than Congress intended—when the Attorney General personally determines to initiate a preliminary investigation instead of when information is first received in a case. Moreover, the date chosen by the Department of Justice can and probably routinely will be much later in time than Congress intended, since there is no explicit time frame for deciding whether to initiate a preliminary investigation in a case. In the EPA matter, for example, the Justice Department took one month to decide that a preliminary investigation was needed. In another case, the Department reported taking 7 months to decide against initiating such an investigation.

At the Subcommittee hearing on this issue, witnesses and Senators indicated that, to maintain control over the Department of Justice's role in the process and make sure independent counsel proceedings are handled on an expeditious basis, Congress must make it even clearer that the 90-day deadline dates from the time information is first received in a case under the statute.

Criminal Intent.—A third problem with the Department of Justice's implementation of the statute is its practice in several cases to decline further proceedings, despite specific information from a credible source of possible wrongdoing, due to a lack of evidence of the subject's criminal intent. The decision not to proceed has sometimes been made even in the face of conflicting or inconclusive evidence on the subjects' state of mind.

For example, in the EPA case, Attorney General Meese states that the "principal basis" for his decision not to request an independent counsel to investigate whether Edward Schmults had obstructed a congressional inquiry is "the lack of evidence of criminal intent on the part of Mr. Schmults." However, in the same filing with the special court, Attorney General Meese notes that it is "uncontroverted" that Mr. Schmults failed to inform a congressional committee about certain handwritten notes it had requested, because he wanted to avoid another "fight" with that committee. Mr. Schmults' deliberate failure to act is possible evidence of his intent to obstruct the inquiry, yet Mr. Meese deemed it insufficient to warrant further investigation of the case.

The Justice Department's demand for proof of criminal intent to justify continuing independent counsel cases is disturbing, because criminal intent is extremely difficult to assess, especially in the early stages of an investigation. Further, it often requires subjec-

tive judgments, which should ideally be left to an independent decisionmaker. It is not the type of factual question that the Attorney General should be resolving in light of the Attorney General's limited role in the independent counsel process and lack of access to important investigative tools such as grand juries and subpoenas. Witnesses at the Subcommittee hearing were highly critical of this practice and suggested amendments to stop it.

Standard for Requesting Independent Counsels.—A fourth area of concern is the standard being used by the Attorney General in deciding whether to request an independent counsel in a case. The statutory standard is whether there are "reasonable grounds to believe that further investigation or prosecution is warranted." 28 U.S.C. 592(c)(1). In both the EPA and *Whittlesey* cases, however, the Attorney General used a quite different standard to decide on the need for an independent counsel: whether, based on the evidence collected during the preliminary investigation, the case offered a "reasonable prospect of conviction."

The Justice Department defended use of its alternate standard by pointing to language in the statute which instructs the Attorney General, in deciding whether to request an independent counsel, to comply with Department of Justice policies for enforcing criminal law. But in response to an inquiry from the Oversight Subcommittee, the Department also indicated that the "reasonable prospect of conviction" standard was based upon a Department policy governing the commencement of an indictment in a case, not the continuation of an investigation in that matter. Senators and hearing witnesses protested this improper substitution of the standard for deciding whether to request an independent counsel.

Recusal Practices.—A fifth problem identified by the Committee concerns the recusal practices of the Attorney General. The statute relies upon the Attorney General to decide when a preliminary investigation should be initiated in a case and when an independent counsel should be requested. Due to this explicit assignment of responsibility under the statute, a Department of Justice witness informed the Oversight Subcommittee that the Attorney General should employ a presumption against recusal when deciding whether to participate in these cases.

By assigning this authority to the Attorney General, however, Congress never intended that the Attorney General participate in cases giving rise to an appearance of or an actual conflict of interest. To the contrary, Congress has always intended that the Attorney General follow normal recusal practices in these cases to preserve the public's confidence in the fairness and impartiality of the proceedings. Recusal should be exercised, for example, in all cases where the Attorney General has participated in the underlying events or enjoys a financial or personal relationship with the potential subjects of the investigation.

There are several independent counsel cases in which the Attorney General's failure to recuse himself is extremely troubling. For example, Attorney General Meese failed to recuse himself from the case involving Edward Schmults, even though he had participated while counselor to the President in the underlying events of the case (the decision to contest a Congressional inquiry of EPA's handling of Superfund), had worked with Mr. Schmults during the

time the Congressional inquiry was ongoing, had attended college with Mr. Schmults and had known him for more than 20 years. The independent counsel investigating other aspects of the EPA case sharply criticized Mr. Meese's failure to recuse himself from the matter, both before and after he refused her request for expanded jurisdiction to investigate Mr. Schmults' role. Other questionable examples of Attorney General Meese's failure to recuse himself include *In re Iran/Contra* and *In re Whittlesey*.

Even the cases where Mr. Meese did recuse himself, such as *In re Deaver* and *In re Nofziger*, are troublesome due to the lack of any written explanation of the reasons for the decision. The absence of a written decision makes it extremely difficult to understand what standards and facts were considered by the Attorney General in deciding to recuse himself from a case and consequently also to understand his failure to recuse himself in other, possibly similar cases. Legislation which reaffirms the Attorney General's obligation to follow normal recusal rules in these matters and which requires written recusal decisions were proposed by several witnesses expert in ethics law.

Expanded Jurisdiction Requests.—A sixth area of concern involves the Attorney General's treatment of requests by sitting independent counsels for expanded jurisdiction. In the most controversial instance, described earlier, Attorney General Meese refused the request of the independent counsel in the EPA case to investigate two persons, Edward Schmults and Carol Dinkins. In making this decision, Mr. Meese not only opposed the recommendation of the independent counsel, but also opposed earlier recommendations of the Department's Public Integrity Section, a U.S. Attorney asked to comment on the case, and a Committee of the House of Representatives.

The Committee does not find the Attorney General's reasons for refusing the request to be persuasive. It is also troubled by his apparent failure to accord sufficient weight to the opinion of the independent counsel, who was ostensibly more familiar with the matter and more impartial.

Good Cause Removal.—Seventh, the Committee is disturbed by recent policy statements by the Department of Justice regarding its interpretation of the provision in the statute which permits an independent counsel to be removed from office for "good cause." Although no Attorney General has yet attempted to remove from office an independent counsel appointed under this statute, the Department of Justice has indicated that it believes good cause exists for removing any independent counsel who disobeys a lawful Presidential order, even an order which seeks to compromise the very independence of proceedings under this statute.

For example, in response to a Subcommittee inquiry, the Department of Justice has indicated that, under the "good cause" removal standard, a President could fire an independent counsel who refused to obey a Presidential order to grant immunity to the target of the investigation. This interpretation of the statute completely misconstrues Congressional intent, which is to prevent the President's firing an independent counsel unless he or she engages in some type of misconduct, described by one hearing witness, Lloyd Cutler, former counselor to President Carter, as "taking a bribe or

committing an impropriety." The Department's policy statements create enormous potential problems for this provision in the statute and should be corrected.

Standards of Conduct.—Finally, a recent change in policy by the Department of Justice with respect to earnings and postemployment restrictions on independent counsels and their staffs has had a significant and detrimental impact on the independent counsel process. In 1979, the Department of Justice issued a memorandum stating that independent counsels and their staffs were to be considered separate and distinct from the Department of Justice. This decision meant that independent counsels and their staffs were subject to the earnings and postemployment restrictions generally applicable to government employees, but not to the additional restrictions applicable to the Department of Justice employees. In March of 1987, however, the Department reversed its position, declaring that independent counsels and their staffs were to be considered Justice Department employees, subject to its earnings and postemployment rules.

The effect of this abrupt policy reversal is to make independent counsels and their staffs subject to significantly more restrictive rules, possibly including a one-year postemployment prohibition against handling matters before the Department of Justice. The Committee was told that the severity of the new restrictions caused the immediate resignation of one independent counsel and his entire staff as well as the resignation of at least one person from another staff.

Key persons associated with the independent counsel statute, including Judge George E. MacKinnon, presiding judge of the special court, have denounced the new position of the Department of Justice. They argue that independent counsels are explicitly appointed to serve outside the Department. Moreover, they contend that the Department's position is unnecessarily harsh and detrimental to the quality of persons that will agree to serve in the offices of independent counsels. Accordingly, there was a strong call for legislation to clarify the status of independent counsels and their staffs as special government employees serving outside and apart from the Department of Justice.

Procedures of the Special Court and Independent Counsels

In addition to the problems associated with the Department of Justice, the Committee identified problems associated with actions taken by the special court and the independent counsels to implement the statute.

A recent, troubling practice of at least one independent counsel and one independent counsel staff member is the acceptance of work as defense counsels in other, ongoing independent counsel proceedings. Such overlapping obligations raise potential conflict of interest problems. For example, an independent counsel is obligated to uphold the constitutionality of the statute and to defend the authority of the independent counsel. Defense counsel are likely to challenge the constitutionality of the statute, until that issue has been resolved, and press for restrictive interpretations of the independent counsel's authority to act. The Committee believes that during their terms of office, persons serving in independent counsel

offices should refrain from simultaneously participating on both sides of the independent counsel law.

A second group of concerns is associated with the operation of the independent counsel offices and focuses on questions about the length of the investigations, compliance with government policies, and management of funds. The Department of Justice, in particular, claims that independent counsels are spending excessive amounts of money on their investigations, but has failed to specify examples of unwarranted or improper expenditures. Despite the absence of such examples, the potential for abuse has led to suggestions for preventative measures.

A third problem concerns the special court's treatment of its records and pleadings. For example, in *In re Donovan*, the special court was unduly secretive in its release of court filings and its denial of requests by the press for information about state prosecutors' efforts to obtain grand jury materials from that case. In *In re Olson*, the court ruled on a request for expanded jurisdiction with constitutional implications for the entire statute without permitting interested observers to participate in the legal debate. While the Committee appreciates the court's vigilance in maintaining the confidentiality of records under the statute, it also must caution the court against undue secrecy in its treatment of legal issues of general interest and cases whose subjects are already known to the public. Legislation was suggested to help the court strike a more appropriate balance in its handling of court records.

Finally, several housekeeping problems were uncovered. These include questions over the storage of records from closed independent counsel cases and the provision of adequate personnel and clerking services for the special court. Legislative solutions were requested to resolve these technical matters.

While reviewing the statute to evaluate legislative solutions to the above-described problems, the Committee also determined that certain provisions could be better worded and placed in a more logical order.

III. PROVISIONS OF S. 1293

To resolve the various problems discussed above, the Independent Counsel Reauthorization Act of 1987 reorganizes some of the provisions in the independent counsel statute, clarifies certain wording, and creates several new provisions.

SECTION 1. SHORT TITLE

This section states the title of the bill.

SECTION 2. AMENDMENTS

This section replaces the current text of the independent counsel statute with the following provisions.

Section 591. Applicability

Section 591 establishes when the statute is triggered, who is covered, and the circumstances requiring the recusal of the Attorney General.

Triggering the Statute.—Subsection (a) is the same as current law to the extent that it establishes the trigger for the Act to be the moment when the Attorney General receives information about a covered official.

Subsection (a)(1) makes one substantive change in the existing statute. The current law directs the Attorney General to proceed under the statute upon receiving information that a person "has committed" a violation of federal criminal law. Subsection (a)(1) changes "has committed" to "may have violated." It cannot be expected, at this first step in the process, that the Attorney General could or should determine that a criminal act has been committed. The purpose of the change is to make it clear that the Attorney General should proceed under the Act if the information indicates that a violation of criminal law may have taken place.

The next two subsections of the bill contain language designed to deal with the disturbing practice of the Department of Justice, described earlier, to conduct "threshold inquiries" in cases to determine whether the information received is sufficient to trigger a preliminary investigation. These inquiries have sometimes lasted months, involved elaborate legal and factual analyses, and led to the termination of proceedings under the Act.

Subsection (a)(2) states that, in deciding whether to conduct a preliminary investigation under the statute, "the Attorney General shall consider only—(A) the specificity of the information received, and (B) the credibility of the source of the information." This subsection adds the word "only" to the current standard for deciding whether to conduct a preliminary investigation, to emphasize Congress' intent that the decision to initiate a preliminary investigation rest on these two factors alone. The subsection also simplifies and clarifies the existing statutory language.

Subsection (a)(3) creates a new reporting requirement which attaches if and only if the Department conducts a "threshold inquiry" which lasts more than 30 days. It states that if the Attorney General fails to decide whether to initiate a preliminary investigation within 30 days of receiving the information and later decides not to proceed under the Act, the Attorney General must file an explanatory report with the court.

Under this new provision, frivolous allegations may still be dismissed by the Attorney General with few formalities. But cases whose allegations are examined for more than 30 days may be closed by the Department of Justice only with an explanation to the court. The Committee believes that "threshold inquiries," if needed at all, may be conducted routinely in less than 30 days; in cases where additional time is required, a report will provide the necessary account to justify the extended inquiry.

Subsection (a) also contains a new provision, codifying case law, which explicitly limits the authority of a federal court to overrule a decision by the Attorney General not to conduct a preliminary investigation in a particular case. *See, e.g., Dellums v. Smith*, 797 F.2d 817 (9th Cir. 1986); *Banzhaf v. Smith*, 737 F.2d 1167 (D.C. Cir. 1984). While the Attorney General may have to explain a decision not to conduct a preliminary investigation under such provisions as 592(a)(2) and 593(e), subsection 591(a)(2) makes it clear that the Attorney General retains final authority to make this decision.

Coverage.—Subsection (b) describes the persons covered by the Act. It is the same as current law, except for three changes. In paragraph (6), the overall cap on the time that covered persons are subject to the Act is increased from two years to five. This change is designed to ensure that persons who continue to have close ties to the President and his or her administration for a number of years after leaving office, remain subject to the independent counsel process.

Second, in paragraph (8), the bill clarifies which campaign officials are covered by the Act, without changing the substance of the provision. It states that only campaign officials exercising authority at the national level are covered by the Act and that the Act applies to campaigns managed by both the national political parties and individual candidates' organizations. Further, the paragraph specifies the periods during which the coverage extends, indicating that it applies during the period of the campaign and—if the candidate is elected or re-elected president—during the incumbency of that President.

Finally, the bill clarifies and simplifies language in paragraph (9), which authorizes independent counsel proceedings for any person, in addition to those specifically covered, whose investigation by the Department of Justice might result in a conflict of interest. This paragraph is intended to continue functioning as a "catchall" provision which gives the Attorney General the discretion to use the independent counsel process for any person not explicitly named in the Act as a covered official. This provision could apply, for example, to members of the President's family and lower level campaign and government officials who are perceived to be close to the President.

Recusal.—Subsection (c) is a new provision governing the recusal of the Attorney General from cases under the Act. It requires the Attorney General to consider recusal in every independent counsel case. It comes into play whenever the Attorney General receives information under the statute about possible wrongdoing, whether conveyed under section 591(a) with respect to a new matter or under section 594(e) as information related to an ongoing case.

The provision states that recusal is required whenever information received under the Act "involves" a high-level official in the Department of Justice or "a person with whom the Attorney General has a current or recent personal or financial relationship." This standard is designed to prevent the Attorney General from handling cases in which, for example, he or she participated in the underlying facts or had the type of relationship with a person in the case which creates an appearance of or an actual conflict of interest. It deliberately rejects the suggestion that the Attorney General employ any type of presumption against recusal when deciding whether to participate in these cases.

A case "involves" a high-level Justice Department official when that official has in some respect participated in the underlying events which gave rise to the case. Examples include cases where the official has performed or played a material role in the conduct being questioned, has participated in the decisionmaking process to plan or approve such conduct, has provided specific legal advice on such conduct, or is otherwise a material witness in the case. The

degree of involvement in the underlying events which would require recusal from the case is left to the judgment of the Attorney General, to be evaluated in terms of preventing even an appearance of partiality in the matter.

A "personal relationship" requiring recusal may involve a relative, friend or co-worker, and arise from social, professional or business contacts. The degree of intimacy in the relationship which would require recusal from the case is, again, left to the judgment of the Attorney General. It is intended, again, that consideration be given to the appearance as well as the actuality of bias in a case, since the purpose of the entire independent counsel statute is to ensure public confidence in the handling of these criminal matters.

Subsection (c) requires the recusal decision to be in writing and to specify the facts and reasons that were considered in reaching the decision. The writing requirement applies whether the Attorney General ultimately decides in favor or against recusal. Its purpose is to enable other persons to better understand the standards and reasoning used by the Attorneys General in reaching a recusal decision.

The recusal decision must be made prior to the Attorney General's making any other determination required by the Act, including such determinations as the need for a preliminary investigation or the need for an independent counsel. An Attorney General who initially declines recusal but later learns of facts which make recusal appropriate, should, of course, recuse himself or herself from the case as soon as possible with a written explanation. In the event of a recusal, the provision requires the Attorney General to appoint the U.S. Attorney for the District of Columbia to perform the statutory duties or, if the U.S. Attorney is disqualified due to a conflict of interest, another appropriate official in the Department of Justice.

Section 592. Preliminary Investigations and Requesting an Independent Counsel

Section 592 governs preliminary investigations and the decision to request an independent counsel.

Preliminary Investigations.—Subsection (a) provides the general rules for preliminary investigations. Subsection (a)(1) closely parallels current law, but clarifies the starting date for calculating the 90-day period beyond which a preliminary investigation may not extend without the permission of the special court.

The provision makes it clear that the 90-day period begins on the date that the Department of Justice receives the information which gives rise to the case. The purpose of the clarification is to correct an interpretation of the statute by the Department of Justice, which the special court has accepted on one occasion, that the 90-day period begins at a later date. By correcting this misinterpretation, Congress reaffirms its intent to require prompt consideration of an independent counsel case.

Subsection (a)(2) authorizes Congress to ask the Attorney General to request an independent counsel. It is the same as current law, except that it clarifies that Congress may request the initiation of a preliminary investigation as well as the appointment of an inde-

pendent counsel. The decision to do either, however, remains with the Attorney General.

Subsection (a)(3) prohibits the Attorney General, when conducting preliminary investigations, from using grand juries, plea bargaining, grants of immunity or subpoenas. This provision is the same as current law. The subsection also, however, adds a new provision to the statute. It prohibits the Attorney General, in cases where there is "conflicting or inconclusive evidence" on the subject's state of mind, from refusing to conduct a preliminary investigation or to apply for the appointment of an independent counsel solely because the subject of the investigation "lacked the state of mind" required to prove a criminal violation.

This new provision is the result of cases described earlier, such as the one involving Edward Schmults where the Attorney General declined to request an independent counsel because he determined there was insufficient evidence to prove that Mr. Schmults possessed the requisite criminal intent. Attorney General Meese made his decision even though the deliberate actions of Mr. Schmults in failing to disclose certain documents to a Congressional committee meant there was some evidence that Mr. Schmults had the necessary intent to sustain a criminal charge.

States of mind are inherently difficult to prove, particularly when the investigator is prohibited from using such tools as grand juries and subpoenas. Even after a full investigation, determination of a person's state of mind often necessitates the type of subjective judgments which should not be made by the Attorney General, in light of the limited role reserved for the Department of Justice in the independent counsel process. For these reasons, questions about a subject's state of mind, unless the answer is without dispute, should not play a decisive role in the Attorney General's determination to close a case under the statute.

It is theoretically possible that the Attorney General would have a case in which the evidence disproving criminal intent is so compelling that it justifies closing the entire matter. The provision thus leaves open the possibility of discontinuing a case due to evidence clearly disproving a criminal state of mind. However, in the more common situation where there is conflicting or inconclusive evidence on the subject's state of mind, the provision prohibits the Attorney General from closing the case solely because he or she has evaluated the evidence and found the evidence against intent more persuasive or the evidence establishing intent insufficiently strong. The provision requires that, in such cases, the Attorney General must leave that issue to an independent counsel.

Subsection (a)(4) permits one 60-day extension of the time available to complete a preliminary investigation. It is the same as current law.

Deciding To Request an Independent Counsel.—Subsections (b) and (c) cover the situation in which, after conducting a preliminary investigation, the Attorney General decides whether or not to request the appointment of an independent counsel. The subsections employ the same standards as current law, except that they emphasize, at this point in the independent counsel process, a decision to proceed or not to proceed under the Act must rest on a judgment about the need for further "investigation" rather than on the ulti-

mate prospects for conviction. To accomplish this purpose, the Attorney General is instructed to consider only the need for "further investigation" rather than the need for "further investigation or prosecution."

Further, the provision narrows current law directing the Attorney General, when deciding whether to request an independent counsel, to consider Department policies on the "enforcement of criminal laws." Hearings held within the Committee indicate that the Attorney General has misused this provision to justify replacing the statutory standard for requesting an independent counsel—which asks whether there are "reasonable grounds to believe further investigation or prosecution is warranted"—with a Departmental policy related to indictments—which asks whether there is a "reasonable prospect of conviction." Subsections (b) and (c)(1) stop this misuse by stating that, in deciding whether to request an independent counsel to continue the investigation of a matter, the Attorney General shall consider only those policies which "pertain to the conduct of criminal investigations."

Subsection (c)(2) in the existing statute requires the Attorney General to request an independent counsel "if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation of prosecution is warranted." This provision prevents the Attorney General from delaying proceedings under the Act through inaction or indecision in a case. The bill strengthens this provision by requiring that, if the Attorney General decides not to seek an independent counsel in a case, he or she must *notify* the special court of that decision prior to the 90-day deadline.

The remainder of the section addresses the receipt of additional information about a case, describes how to apply for an independent counsel, and prohibits judicial review of a decision to seek an independent counsel. While it contains some clarifying language, it is substantially the same as current law.

Section 593. The Special Court

Section 593 focuses on the special court. Subsection (a), which cites the authority for the creation of the court, is the same as current law.

Subsection (b), which authorizes the special court to appoint independent counsels and to define their prosecutorial jurisdictions, is the same as current law, except that it explicitly recognizes that the special court has the discretion, before defining an independent counsel's jurisdiction, to consider comments by interested persons. The special court is under no obligation to solicit such comments, to supply case information to persons wishing to provide such comments, or to define the jurisdiction in line with the comments submitted. It also should not unduly delay the appointment process to consider them. "Interested persons" is intended to be interpreted broadly to encompass such individuals, groups and organizations as, for example, Congress, parties concerned with the operation of the independent counsel statute, and parties concerned with the particular case under consideration. When defining an independent counsel's jurisdiction, the special court may also take judicial

notice of "facts" as authorized by Rule 201 of the Federal Rules of Evidence.

A new subsection (c) clarifies the scope of an independent counsel's prosecutorial jurisdiction by providing that it automatically includes the authority to investigate and prosecute federal crimes which may arise out of the investigation or prosecution itself. Such crimes include but are not limited to perjury, obstruction of justice, destruction of evidence and intimidation of witnesses. This provision codifies current practice.

Subsection (d), which permits the special court to expand the jurisdiction of a sitting independent counsel upon the request of the Attorney General, is the same as current law.

A new subsection (e) states that, when the special court receives notice from the Attorney General declining to appoint an independent counsel in a particular case or declining to investigate matters which a sitting independent counsel has asked to be investigated, the court may not change this decision in any way, but may remand the matter to the Attorney General for further explanation of the reasons for the decision. This new remand provision, which is essentially a reporting requirement triggered by the court, is designed to increase the accountability of the Attorney General to the Congress and the public for a decision *not* to proceed in a case, thereby helping to insure compliance with the statutory standards. When remanding a matter to the Attorney General, the special court may not require additional investigation by the Department of Justice, but only further explanation of the investigation already completed.

Subsection (f) describes the qualifications that the special court should consider in selecting a person to serve as an independent counsel. It adds one new provision to the statute, directing the special court to appoint individuals who will conduct their activities in "a prompt, responsible, and cost-effective manner." This new provision is designed to encourage the selection of persons who will balance the need to perform thorough investigations with the need to act swiftly and with regard for the taxpayers' purse. While the goals of speed, responsible prosecution and fiscal restraint are not always complimentary, the candidates should be instructed that each is important and should indicate a willingness to pursue all three on a balanced basis, according to the best of their ability and judgment.

Subsection (f) also deletes a provision in existing law which prohibits the selection of persons who "recently held" federal office. This prohibition is overly restrictive since, for example, a person who recently held the office of U.S. Attorney might be an ideal independent counsel. While it is intended that the special court remain sensitive to possible conflicts of interest which may arise from appointing a person who recently held office in the same Administration as the subject of the investigation, the statute no longer requires the court to wholly disregard such persons from consideration as possible candidates.

Subsection (g), which describes what happens when there is a vacancy in the office of an independent counsel, is the same as current law.

Subsection (h) contains two new provisions related to the special court's authority to award attorney fees to the subjects of independent counsel investigations. The purpose of these new provisions is to ensure the award of only reasonable amounts of attorney fees in appropriate cases. The first places a cap on the hourly rate that can be awarded to a subject's attorney, stating it cannot exceed the hourly rate paid by the federal government to the independent counsel in that case. An independent counsel's hourly rate should be determined by dividing his or her annual rate of compensation by 2,000 (40 hours per week for 50 weeks per year). The second provision in the subsection authorizes the court to obtain from the Department of Justice an evaluation of any attorney fee request. This analysis will help the court to evaluate the reasonableness of the fees requested.

It has sometimes been suggested that, when considering whether to award attorney fees under the statute, the special court should take into consideration whether the subject of the investigation requested an independent counsel. This factor should not play any role in the decision to award attorney fees. The statute specifies that the Attorney General must request an independent counsel whenever there are reasonable grounds to believe further investigation is warranted in a case; the desires of the possible subject of the investigation are irrelevant to the decisionmaking process.

The next two subsections consolidate and clarify the statutory provisions governing disclosure of court filings. Subsection (i), which maintains current law, prohibits the release of court filings without the special court's express permission. New provisions make it clear, however, that any person may file a motion with the court to see these materials, and that special consideration should be given to document requests from Congressional committees with responsibilities to oversee the independent counsel process.

In considering whether to release court filings, it is intended that the court balance the right of the subjects of investigations to be shielded from publicity about unfounded or unfair allegations with the right of the public to inquire about prosecutions under this Act. In balancing these concerns, the court should weigh such factors as whether the subjects of the investigations have already been disclosed to the public; whether the subjects do not object to the filings being released to the public; whether the filings contain information which is already publicly known; and whether the court filings consist of legal or factual rulings in a case which should be publicly available to understand the court's rules and precedents or to follow the developments in a particular matter. While the secrecy of grand jury proceedings must, of course, be protected, the argument that all litigation connected with independent counsel proceedings will necessarily reveal grand jury proceedings is not tenable; greater discernment should be exercised in these matters.

In a similar vein, subsection (j), also new, authorizes the special court, "when presented with important legal issues," to disclose information about these issues so that interested parties may contribute to the analysis of them through presentations as *amicus curiae*. The Committee believes that the special court possesses this authority under current law, but this provision is necessary to encourage disclosure in appropriate cases. It is designed to prevent

the problems which arose, for example, when the special court was presented with an independent counsel's request for expanded jurisdiction in *In re Olson* to investigate persons whom the Attorney General had already twice refused to subject to an independent counsel investigation.

This motion presented crucial issues of first impression, with constitutional implications for the entire Act. Because the court did not reveal any information about the motion until after ruling on it, interested observers such as Congress, the American Bar Association and others were unable to address the issues in any way. Subsection (j) is intended to correct this situation by clarifying the court's authority, when faced with important legal issues, to reveal sufficient information about them to permit the public to participate in the legal debate.

Section 594. Independent Counsel

Section 594 establishes the authority and duties of an independent counsel.

Most of the subsections are the same as current law, including those describing the authority of an independent counsel, compensation for the office, availability of staff, the duty of the Department of Justice to assist independent counsel investigations, the right of the Department to refer related matters to an independent counsel, the independent counsel's right to dismiss matters, and the independent counsel's duty to report to Congress on matters related to impeachment.

Several paragraphs of subsection (a), unchanged from current law, authorize independent counsels to issue subpoenas. When issuing such subpoenas, an independent counsel stands in the place of the Attorney General and should follow relevant Department of Justice policies and practices. Subpoenas issued by independent counsels are ultimately reviewable by the federal courts under Rule 17(c) of the Federal Rules of Criminal Procedure which authorizes courts to quash any subpoenas which are "unreasonable or oppressive."

Another provision in subsection (a), unchanged from current law, concerns the ability of independent counsels to obtain "appropriate national security clearances." 28 U.S.C. 594(a)(6). This provision is not intended to require the federal government to award national security clearances to any independent counsel who requests them. Instead, it requires the government to process an application by an independent counsel for national security clearance in the most expeditious fashion possible to determine whether it would "appropriate" to award the clearance to that person. Use of the word "appropriate" to award the clearance to that person. Use of the word "appropriate" means that independent counsels are authorized to obtain only those clearances which they are qualified to receive under law.

Another unaltered provision, subsection 594(a), also requires comment. It states that the Department of Justice shall provide assistance to independent counsels who request it, including "the use of the resources and personnel necessary to perform the independent counsel's duties." This provision enables independent counsels to use, for example the laboratory resources and investigative

agents of the FBI as well as other physical resources and expert personnel in the Justice Department. It also enables them, standing in the shoes of the Attorney General, to request assistance from other investigative agencies such as the Internal Revenue Service, Secret Service, Inspectors General and Customs Service, which routinely assist the Department of Justice with its criminal investigations.

Problems have arisen in the implementation of this provision because, while the Justice Department has provided access to its facilities and personnel, it has in a few instances demanded that independent counsels sign reimbursement agreements to obtain the needed services. In one case, the agreement required reimbursement for the use of a senior systems analyst (a Department of Justice employee) at a rate of \$46.00 per hour, which is the equivalent of an annual salary of more than \$90,000.00. In other instances it appears the Department has charged independent counsels for expenses it does not charge to other criminal cases, such as for rental cars used by FBI agents and for furniture taken from the Department's storage facilities.

The Department's insistence on reimbursement is curious since the Justice Department is the agency that ultimately pays the expenses of the independent counsels. It is, in effect, demanding reimbursement for itself. The additional practice of imposing apparently excessive or unusual charges on independent counsels creates an inaccurate record of expenses for these cases.

The Justice Department is also not the only agency to engage in these practices. For example, the Internal Revenue Service (IRS) has recently demanded that an independent counsel sign a reimbursement agreement to use IRS investigative agents, even though it appears the IRS does not demand similar reimbursement from the Justice Department for the assistance of such agents with other criminal cases. Reimbursement appears particularly inappropriate since these agents will presumably be performing IRS work—investigating federal tax fraud.

The insistence on reimbursement agreements has been criticized by the Administrative Office of the United States Courts, among others, as a practice that should be stopped. It creates additional paperwork and distorts the costs of independent counsel investigations relative to other Justice Department investigations. Such arrangements also, when coupled with excessive or unusual charges, distort the true costs of independent counsel investigations.

Congress intended the Justice Department to provide independent counsels with the same assistance it provides to its other high-priority, federal criminal cases, on the same nonreimbursable terms. Congress also intended other investigative agencies to provide assistance to independent counsels in the same manner they provide it to the Justice Department, on the same nonreimbursable basis available to that Department. Given this clarification of the statutory language, federal agencies are instructed to discontinue the practice of requiring reimbursement agreements or imposing excessive or unusual charges on independent counsels when providing the assistance mandated by subsection (d).

In addition to reauthorizing provisions contained in current law, section 594 provides the following new or modified provisions.

Requests for Expanded Jurisdiction.—Under the existing statute, if an independent counsel receives or uncovers information about criminal conduct which is outside but “related to” his or her prosecutorial jurisdiction, the independent counsel may ask either the Attorney General or the special court for expanded authority to investigate the new matter. The special court, in *In re Olson*, significantly restricted this provision where, as explained earlier, it ruled that its authority to grant a request for expanded jurisdiction does not extend to cases in which the Attorney General has previously denied the same request.

In light of this case law and concerns about the Attorney General’s failure to accord sufficient importance to the request of the independent counsel, the bill amends subsection (e) to require independent counsels to present all requests for expanded jurisdiction first to the Attorney General. The bill then requires the Attorney General to conduct a preliminary investigation of the new matter for no longer than 30 days. After this investigation, the Attorney General must decide whether to grant the request for expanded jurisdiction and refer the matter to the existing independent counsel, to request the appointment of a new independent counsel, or to close the matter because “there are no reasonable grounds to believe that further investigation is warranted.” In making this decision, the legislation requires the Attorney General to accord “great weight” to any recommendations from the sitting independent counsel.

The bill deletes the authority of the special court to grant, on its own, a request for expanded jurisdiction and instead rests this decision with the Attorney General. By lodging final decisionmaking authority with the Attorney General, but also requiring the Attorney General to give “great weight” to the recommendations of the sitting independent counsel, the bill establishes a process by which a request for expanded jurisdiction is handled not only within the constraints of the Constitution, but also with assurance that the independent counsel is given a meaningful role in the decisionmaking process.

DOJ Policies.—Subsection (f) requires independent counsels to comply with the written or other established policies of the Department of Justice respecting the enforcement of criminal law. This provision strengthens current law, which requires independent counsels to comply with these policies “except where not possible.”

The purpose of this change is to emphasize that independent counsels should follow the same rules in their investigations as apply to other federal criminal investigations, so that the subjects of the investigations are treated in the same manner as other persons. Some examples are Department policies: listing the factors a prosecutor must consider in deciding whether to commence prosecution in a case and prohibiting indictment unless the admissible evidence “will probably be sufficient to obtain a conviction.”

By obligating independent counsels to comply with the Department’s policies on law enforcement, however, the policies are not intended to be transformed into mandatory directives; they are intended to retain their character as important guidelines which should be followed unless an unexpected situation or other good reason justifies making an exception. Finally, the provision is not

intended to provide the Department of Justice with a legal basis for assuming control over the prosecution strategy of independent counsels in order to enforce compliance with the Department's policies. The provision is not directed to the Justice Department but to the independent counsels, instructing them in the policies that must guide their law enforcement efforts.

Ethical Violations.—Another new provision is subsection (h). It permits an independent counsel to refer possible violations of federal ethical standards to the Office of Government Ethics and any other appropriate federal agency or officer. While the Committee believes existing laws already authorize such referrals, this provision is included because at least one independent counsel has indicated his belief that current law is inadequate. Under the new provision, it is not the role of an independent counsel to become expert in ethics rules or to make ethical findings in a particular case. The subsection only provides that, if an independent counsel suspects that an ethical violation may have occurred, he or she may refer the matter to the appropriate agencies.

Reports.—Subsection (i) is a modified provision which increases the accountability of independent counsels by expanding their reporting obligations. Under current law, independent counsels are required to file a final report before terminating office. The new provision requires an independent counsel to file an "initial report" within 30 days of appointment and an "status report" every 60 days thereafter, as well as the "final report" required under current law. These reports are filed with the special court, which controls their release.

The new reports require independent counsels to estimate the length of their investigations, staff needs, and future expenses, as well as to explain subsequent, major unexpected expenses. The purpose of the new reports is to require independent counsels to plan and justify their expenditures; to increase the independent counsels' accountability for the length and costs of their investigations; and to enable Congress to keep better track of the independent counsels' activities and costs.

Materials from Closed Cases.—Another new provision is subsection (k). It is a needed housekeeping measure governing what happens to the materials compiled by independent counsels. Essentially, it instructs each independent counsel, upon terminating office, to transfer the records created or received by that office to the Archivist of the United States.

By specifying the transfer of "records" to the Archivist, the statute intends the independent counsel to be able to rely on an existing body of law to define that term. *See, e.g.,* 44 U.S.C. 3301. It includes books, papers, documentary materials, sound recordings, films, photographs, charts, exhibits, models, maps, works of art, computer tapes and other materials.

By requiring the transfer of records "which have been created or received by the independent counsel office," the statute means to encompass the whole of the materials collected or produced by the office. However, this provision is also intended to be applied in a reasonable fashion; it requires the independent counsel to act with reasonable diligence to ensure the transfer of all items which fall

within the definition of "record," but not to keep track of every slip of paper which comes into the possession of the office.

In carrying out the recordkeeping responsibilities imposed by this section, it is intended that the independent counsel establish reasonable safeguards to prevent the removal or loss of records from the office and to preserve records which protect the legal and financial rights of the Government and of persons directly affected by the independent counsel's activities. Guidance for establishing such safeguards should be sought from the Archivist.

Subsection (k) is intended to apply to the records of past, current and future independent counsel cases. The Committee learned that the records from closed independent counsel cases are now stored with the special court. The Committee intends that the special court transfer these records promptly to the Archivist. The section's provisions do not apply to the papers of the special court itself, but to the independent counsels' own records which have been placed in the court's storerooms for safekeeping. Any other records from closed independent counsel cases, stored elsewhere, should also be transferred promptly to the Archivist.

Once transferred to the Archivist, the section makes it clear that the independent counsel records are subject to the Federal Records Act and the Freedom of Information Act. These are the statutes that generally govern the maintenance, use and disposal of federal records by the Archives, including records from criminal investigations and prosecutions. It is intended that the Archivist apply the same rules to the independent counsel records as are applied to similar sets of records in the Archivist's custody, including rules protecting classified materials, national security concerns, tax information, informants' identities, and grand jury materials. The Archivist often consults with the Department of Justice when applying the Freedom of Information Act to law enforcement records, and it is intended that this consultation also be used with respect to independent counsel records, where appropriate.

Finally, a special provision grants the Justice Department access to all non-grand jury materials so long as it is requesting them for purposes of an ongoing law enforcement investigation or court proceeding. This provision means that the Justice Department may not gain access to these records for an investigation unrelated to its law enforcement activities, but could obtain them for such purposes as a subsequent prosecution or civil suit. The Department can gain access to grand jury materials from a closed independent counsel case only as provided by Rule 6(e) of the Federal Rules of Criminal Procedure.

Standards of Conduct.—A new subsection (1) has been added to the statute to resolve the ongoing controversy as to the standards of conduct applicable to independent counsels and their staffs.

Paragraph (1) states that each independent counsel, together with the persons he or she appoints as staff, forms an agency distinct from the Department of Justice for purposes of applying federal standards of conduct. A later section of the bill further clarifies their status as "special government employees."

Together, these provisions specify the place that independent counsels and their staffs occupy in an existing statutory scheme, thereby clarifying the federal standards of conduct, such as those

on outside earnings and postemployment restrictions, which apply to them. This section is intended to apply to existing as well as future independent counsels and their staffs. It is also intended to apply to independent counsels who have accepted "backup appointments" from the Department of Justice, since these appointments are to positions outside of the Department's normal hierarchy and operations and should be considered as appointments to a distinct and independent office.

Because independent counsels are appointed to handle politically sensitive investigations for the primary purpose of avoiding any appearance of partiality or bias, it is particularly important that they and their investigations be above any suspicion or allegation regarding conflicts of interest.

Paragraph (2) sets up two prohibitions which apply to independent counsels and their staffs during their terms of office. The first is a prohibition against simultaneously representing another person subject to proceedings under this Act; the second is a prohibition against simultaneously holding any other office with the United States. These two provisions seek to prevent even an appearance of impropriety or of overly-familiar associations with other executive agencies from affecting the independent counsel offices. Both prohibitions apply to the independent counsels and their staffs personally; they do not apply to any law partners or law firms with whom these persons may be associated.

Paragraph (3) creates a postemployment restriction for independent counsels and their staffs. It states that, for five years following the termination of an independent counsel's office, persons who served as the independent counsel or on the staff may not represent a person who was a subject of their proceedings under this Act. This prohibition extends to both civil and criminal matters. It again applies solely to the former independent counsel and staff members, and not to any partners or law firms with whom these persons may be or may have become associated.

Paragraph (4) creates a transition rule. It states that any person who, upon enactment of this Act, is not in compliance with the standards of conduct imposed by this subsection, has 90 days from the date of enactment to make suitable arrangements to attain such compliance. An exception is made for independent counsels and staffs who, at the time of enactment, also hold a federal office, such as a "backup appointment" from the Justice Department. Having to surrender such a "backup appointment" would confuse the status and authority of ongoing proceedings under the statute and unnecessarily complicate court challenges to such proceedings. Thus, the prohibition against holding federal office applies only prospectively, to independent counsels and staffs who assume office after the date of enactment of this Act.

In addition to the standards of conduct explicitly established or referenced by this subsection, independent counsels and their staffs are intended to guide their conduct according to applicable rules in the Code of Professional Responsibility and Model Rules of Professional Responsibility promulgated by the American Bar Association.

Cost Controls.—Finally, a new subsection (m) requires independent counsels to conduct their activities with "due regard for ex-

pense" and to authorize only "reasonable expenditures." The purpose of this provision is to clarify the authority of independent counsels to spend federal funds in the conduct of their investigations and prosecutions.

Exercising "due regard for expense" means that an independent counsel must not conduct an investigation or prosecution on the premise that "price is no object" or that costs are irrelevant when making decisions in the case. Independent counsels, like all other federal employees, must take care that federal funds are spent wisely and without extravagance or waste.

"Reasonable expenditures" are expenditures which are necessary and proper to the conduct of the independent counsel's investigation and prosecution, and which reflect fiscal restraint. In deciding whether to incur a particular expense and, if so, how much to pay for the underlying item, independent counsels should be guided by the rules and practices of other federal agencies. For example, independent counsels should follow the rules and practices of the Department of Justice for such items as travel costs, per diem expenses, accommodations, salaries, expert witness fees and other legal expenses. They should follow the rules and practices of the General Services Administration on such items as office space and equipment.

Independent counsels should also, where possible and appropriate, make use of existing government personnel and resources to meet their administrative and investigative needs rather than rely on outside sources. This practice should save administrative, personnel, and other costs, producing savings, for example, in the procurement of office space, furniture and equipment, legal materials and laboratory work, as well as the employment of investigative and administrative personnel.

At the same time, it is important to note that, while independent counsels are intended to follow the fiscal practices of other federal agencies, it is also understood that they may have to deviate from these rules to accomplish their missions, which include quickly establishing a new office and proceeding expeditiously on a high-priority criminal case. Their missions may entail unusual expenses or higher costs than other agencies normally incur but which, in the context of the independent counsel's mandate, are nevertheless "reasonable expenditures." Independent counsels should not, in the interests of fiscal restraint, sacrifice the quality or thoroughness of effort that a responsible investigation and prosecution may require.

To perform the administrative tasks associated with determining allowable costs, independent counsels are encouraged to appoint an administrative officer whose primary duties include learning federal rules on allowable expenses and use of agency personnel and resources, advising the independent counsel on these rules, overseeing the authorization and payment of expenses, and keeping the accounts for the office.

Section 595. Congressional Oversight

Section 595 governs congressional oversight of the independent counsel process. Subsection (a), which applies to congressional oversight of independent counsels, is the same as current law.

Subsection (b) is new and applies to congressional oversight of the Attorney General's conduct in the independent counsel process. It states that, in the early stages of the independent counsel process, the Attorney General must supply certain basic information about cases which have become known to the public, such as whether proceedings are taking place under this Act and whether a decision has been reached *not* to initiate a preliminary investigation in a particular matter.

A case "becomes public" when its substance or subjects are disclosed in the press or otherwise made available to the general public as, for example, through disclosures by the special court or the Department of Justice. In complying with the subsection, the Department need not disclose the identity of any person who is a subject of the case, if that persons' identity is not already public information. The Department of Justice may convey the specified information orally or in writing. The Department must also, upon request, disclose documents from closed independent counsel cases. This provision applies to all cases under the Act since 1978, and requires disclosure of such documents as, for example, a recommendation to the Attorney General by the Public Integrity Section on whether an independent counsel is needed in a particular case. The purpose of these provisions is to enable congressional committees with oversight responsibilities to keep better track of actions taken by the Attorney General to implement the Act.

Section 596. Removal or Termination of Office

Section 596 governs actions taken to remove an independent counsel from office or to otherwise terminate the office. It is the same as current law, except for one new provision which states explicitly that "removal for good cause shall not justify a removal based on the refusal of an independent counsel to obey an order of the President if that order would compromise the independence of proceedings under this chapter or otherwise violate the purposes of this chapter."

The bill adds this statement to the Act because of the Department of Justice's position that an independent counsel's failure to obey *any* lawful Presidential order would constitute "good cause" for removal. The bill makes it clear that an independent counsel cannot be removed for failure to follow a Presidential order which would compromise the independence of the proceedings under this Act.

Section 597. Department of Justice

Section 597 describes the relationship between the Department of Justice and the independent counsels. It is the same as current law.

Section 598. Severability

This new section makes explicit the common law rule that, in the event a court finds any portion of the statute invalid, the remainder of the statute stays in effect.

SECTION 3. TECHNICAL AMENDMENTS

Subsection (a) changes the appropriate chapter tables and headings in the United States Code. Subsection (b) coordinates certain provisions of the statute with the Comprehensive Crime Control Act of 1984. Subsection (c) clarifies the status of independent counsel and their staffs as "special government employees." This provision is intended to apply to independent counsels and their staffs who are in office at the time of enactment of this Act as well as to those who will be appointed after the date of enactment. Subsection (d) clarifies the status and duties of the clerk of the special court. This provision makes it plain that the clerk of the U.S. Court of Appeals for the District of Columbia also serves as the clerk of the special court and must see to the staffing, docketing and other clerical needs of that court.

SECTION 4. EFFECTIVE DATE

This section states that the effective date of the Act will be the date of its enactment. The Act is intended to apply to the greatest extent possible to existing and future independent counsel proceedings. For example, even in a case begun before enactment of this Act, it is intended that the new provision on recusal apply to an Attorney General's consideration of an independent counsel's request for expanded jurisdiction, if that request were made after enactment of this Act.

IV. ESTIMATED COST OF LEGISLATION

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 13, 1987.

HON. JOHN GLENN,
*Chairman, Committee on Governmental Affairs,
U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed S. 1293, the Independent Counsel Reauthorization Act of 1987, as ordered reported by Senate Committee on Governmental Affairs, July 1, 1987. CBO estimates that enacting this legislation would result in no significant additional costs to the federal government.

S. 1293 would reauthorize the independent counsel program created by the Ethics in Government Act of 1978 (Public Law 95-521); the program is scheduled to expire in January 1988. Under this bill, independent counsels would be appointed by a special panel of senior judges upon the recommendation of the Attorney General, which would be based on the results of a preliminary investigation or a request from the Congress, to investigate high-level government officials who may have committed a criminal offense. Until recently, these investigations have been infrequent, averaging about one per year, although six independent counsels are currently conducting investigations. In the absence of reauthorizing legislation, the Department of Justice (DOJ) would have responsibility for these investigations, and could appoint a special prosecutor, as

was used for the Watergate and Carter peanut warehouse investigations.

The effect of this bill on federal spending is not expected to be significant, because there are likely to be few independent counsels appointed and the cost of their investigations is not likely to differ substantially from the costs that would otherwise be incurred by the Department of Justice. The costs of completed independent counsel investigations range from a low of \$3,000 for the investigation of Timothy Kraft to just over \$300,000 for the investigations of Raymond Donovan and Edwin Meese, according to the Administrative Office of the United States Courts (AOUSC). The Iran-Contra investigation has reportedly cost more than these, but precise cost figures are not available. Little information is available on the costs of similar investigations conducted by the DOJ prior to the enactment of the independent counsel statutes. Most small investigations were conducted with available resources and had no significant cost, according to the DOJ, but the Carter peanut warehouse investigation, which involved a special prosecutor appointed by the Attorney General, cost nearly \$400,000.¹ While independent counsels are not subject to the same budgetary oversight that would apply to a DOJ investigation, the total amounts of money involved are relatively small and there is no basis to conclude that a DOJ investigation would differ significantly in cost.

Enacting this bill would not affect the budgets of state or local governments.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

V. EVALUATION OF REGULATORY IMPACT

The statute is not expected to require the issuance of any additional regulations by any federal agency.

VI. COMMITTEE VOTE

The rollcall vote taken during Committee consideration of this bill is as follows.

¹ The cost figures cited in this paragraph are the total costs of the investigations, not the additional costs to the federal government. The figures include certain salaries and expenses that would have been paid even if these investigations never took place.

Final passage: Ordered reported, 13 yeas; 1 nay.

YEAS (13)

NAYS (1)

Glenn
Chiles
Levin
Sasser
Pryor
Mitchell
Cohen
Rudman
Nunn ¹
Bingaman ¹
Roth ¹
Heinz ¹
Trible ¹

Stevens

¹ Proxy.

VII. ADDITIONAL VIEWS OF MR. RUDMAN

Although I voted to report S. 1293 to the full Senate for its consideration and have been a cosponsor of previous bills to authorize and reauthorize the Act, I have serious concerns about its current structure and implementation. In particular, there is a need to address the qualifications of independent counsel and the administrative structure under which they work. I am also troubled by the notion of permanently reauthorizing an Act, the full implications of which are only now being brought to our attention.

Senators Levin and Cohen have argued quite effectively that a mechanism is needed to provide for the investigation and, if necessary, the prosecution of certain designated Federal officials. These officials are those whose close working or personal relationship with the President could threaten the public's confidence in the Attorney General's objectivity in deciding whether to undertake a criminal investigation or to prosecute alleged wrongdoing. They also correctly point out that a process which is viewed as independent by the public benefits the official who is the subject of the investigation as well. A finding that there is no basis for a criminal prosecution can only be persuasive if rendered by an individual who is perceived to be disinterested.

I have no quarrel with the goal my colleagues seek, only with the method employed to achieve it. Although the current Act has served to instill confidence in the public that these officials will be fully subject to the criminal laws of the United States, I am unconvinced that Congress can be equally confident that these officials are being fairly subjected to our criminal laws.

Unlike most criminal inquiries, investigations undertaken pursuant to the Independent Counsel Act are routinely subject to a great deal of publicity. The reputation of an official who is the subject of such an investigation is, as a result, under a cloud during the pendency of the investigation. For this reason, and in the interest of fairness, it is essential that these investigations not be undertaken lightly and that they be completed in a timely fashion. In this regard, it should be noted that while some investigations have been completed expeditiously, such as that of former Secretary of Labor Raymond Donovan, others continue to drag on for no apparent reason. Moreover, one of the shortcomings of this Act is that, because of its structure, there is no one in a position to ensure that the independent counsel expedites the investigation, as there would be were it undertaken by the Justice Department. Those under investigation can merely hope that the independent counsel feels compelled to act in a timely fashion. If he or she does not, there is no recourse.

In my view, investigations by independent counsel should be undertaken with appropriate regard for the importance of a timely conclusion or prosecution and should not be reduced to criminal

fishing expeditions. An important factor in ensuring that result is the selection of independent counsel who, by virtue of relatively recent prosecutorial experience, are likely to determine more expeditiously the facts and analyze those facts in light of applicable law. I do not assert that that will always be the case, but over time, individuals who bring to the investigation a familiarity with the criminal justice system are more likely to conduct the investigation expeditiously, efficiently and with a greater ability to evaluate the facts of the case in light of applicable law.

Insofar as we would consider it unwise for a defendant to hire as a defense attorney an individual with no recent experience in defending criminal actions, it is equally unwise for the United States to retain as an investigator and potential prosecutor an individual with no recent prosecutorial experience. This principle is so basic it is difficult to understand why it has not been previously adhered to by the division of the court. But it has not. For that reason, the Act should expressly direct the division of the court to select independent counsel from that pool of attorneys with relative recent and substantial prosecutorial experience.

In addition to my concern about the degree of fairness ensured by the current Act, the number and complexity of pending investigations has served to focus on the absolute vacuum of administrative structure in the Act. I can think of no other context in which Congress would tolerate such a total lack of fiscal oversight or accountability. As laudable as the purposes of this Act are, however, they do not justify such tolerance here either.

Until approximately one year ago, investigations under the Act were relatively small and infrequent. Traditionally, the costs incurred amounted to about \$50,000 per month for approximately 6 months. For the most part the Department of Justice could easily absorb the cost of the investigation and would simply pay the bills. Last year, however, the unanticipated increase in the number and scope of investigations led to higher than expected costs resulting in problems for the Justice Department, the Appropriations Committees of Congress, and the Administrative Office of the United States Courts.

The inability to plan for expenses will continue to be a problem in the future as budget constraints placed upon the Federal government increase. The Act should not be reauthorized on a permanent basis unless and until a mechanism for funding these investigations is developed.

Additionally, to date, the Administrative Office of the Courts has voluntarily, and without statutory authorization, provided all accounting and payroll services for the Independent Counsel under an informal arrangement. These administrative services have been provided by the Administrative Office at the suggestion of the three-judge panel. To cover the cost to the Administrative Office, each Independent Counsel is charged 3% of his or her total expenses.

The Director of the Administrative Office of the Courts has notified the Committee that he would like to see the administrative and logistical support for independent counsel moved to some other organization. The first administrator of Judge Walsh's office has

also recommended that an ongoing or permanent administrator and staff for independent counsel be established.

Such an arrangement would likely result in considerable savings of time and expense for those must train and educate new administrators with each appointment. The Administrative Office has indicated that in light of that office's experience over the past 18 months, such an office, even if consisting only of one person, would be fully justified. The Director of the Administrative Office made three additional suggestions:

- (1) Funding should be provided by means of an indefinite appropriation with oversight hearings held from time to time.

- (2) In addition to a central administrative office, each independent counsel should have his/her own administrative officer to insure that necessary administrative tasks are accomplished by the central office and that accounts are correct.

- (3) The independent counsel should be able to call on investigative agencies for assistance without having to pay personnel costs.

In my view each of these suggestions deserves our thorough review and consideration.

I appreciate the acknowledgement in the Committee Report of some of the issues I have raised in these views and at mark-up. Additionally, I thank my colleagues Senators Levin and Cohen for their willingness to work with me to craft floor amendments to S. 1293 to address these concerns. I fully support their objectives in reauthorizing the Act. Nevertheless, the flaws of the Act are of such a fundamental nature that they must be addressed by Congress before the Act is embedded into the U.S. Code forever.

VIII. ADDITIONAL VIEWS OF MR. STEVENS

On July 1, 1987, the Committee on Governmental Affairs, by a vote of 13-1, agreed to a motion to report the bill S. 1293, with an amendment in the nature of a substitute. On that motion, I voted in the negative because of my strong concerns about the open-ended reauthorization of the Independent Counsel provision of the Ethics in Government Act of 1978, amended.

On that occasion, several of my colleagues, especially Senator Warren B. Rudman, joined in raising substantive objections to many features of the amendment. I associate myself with the views of Senator Rudman, as they were stated at the Committee's markup and as they are set forth in the Additional Views which accompany this Report.

In addition to the objections set forth by Senator Rudman, my own experience as a United States Attorney tells me that the most objectionable consequence of the development of the Independent Counsel provision has been to create a separate and distinct form of justice for a particular class of citizen, the high-ranking, senior federal official. In adopting the peculiar notion that these individuals need their own brand of justice, i.e. that the system of justice which applies to all other Americans is not sufficient or responsive, we have institutionalized the most troubling form of elitism known to a democracy. On the eve of the bicentennial of our Constitution, wherein one standard of justice was held out to all Americans, we have managed to turn our backs on the central tenet of our democratic experience, that justice applies with equal vigor to all and that one's position or influence or wealth will not secure special treatment under the law.

The Independent Counsel provision of the Ethics in Government Act has serious flaws, but none more serious than the incontrovertible assertion that it is antidemocratic in its application and violative of the Constitutional premise that all men are equal under the law.

IX. CHANGES IN EXISTING LAW

In compliance with the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no changes are proposed is shown in roman):

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

* * * * *

§ 49. Assignment of judges to division to appoint independent counsels

(a) Beginning with the two-year period commencing on the date of the enactment of this section, three judges or justices shall be assigned for each successive two-year period to a division of the United States Court of Appeals for the District of Columbia to be the division of the court for the purpose of appointing independent counsels. *The clerk of the United States Court of Appeals for the District of Columbia shall serve as the clerk of such division of the court and shall provide such services as are needed by such division of the court.*

* * * * *

[CHAPTER 39.—INDEPENDENT COUNSEL

[Sec.

[591. Applicability of provisions of this chapter.

[592. Application for appointment of an independent counsel.

[593. Duties of the division of the court.

[594. Authority and duties of an independent counsel.

[595. Reporting and congressional oversight.

[596. Removal of an independent counsel; termination of office.

[597. Relationship with Department of Justice.

[598. Termination of effect of chapter.

[§ 591. Applicability of provisions of this chapter

[(a) The Attorney General shall conduct an investigation pursuant to the provisions of this chapter whenever the Attorney General receives information sufficient to constitute grounds to investigate that any of the persons described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense.

[(b) The persons referred to in subsection (a) of this section are—

[(1) the President and Vice President;

[(2) any individual serving in a position listed in section 5312 of title 5;

[(3) any individual working the Executive Office of the President who is compensated at or above a rate equivalent to level II of the Executive Schedule under section 5313 of title 5;

[(4) any Assistant Attorney General and any individual working in the Department of Justice compensated at a rate at or above level III of the Executive Schedule under section 5314 of title 5;

[(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

[(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection during the period consisting of the incumbency of the President such individual serves plus one year after such incumbency, but in no event longer than two years after the individual leaves office;

[(7) any individual described in paragraph (6) who continues to hold office for not more than 90 days into the term of the next President during the period such individual serves plus one year after such individual leaves office; and

[(8) the chairman and treasurer of the principal national campaign committee seeking the election or reelection of the President, and any officer of the campaign exercising authority at the national level, such as the campaign manager or director, during the incumbency of the President.

[(c) Whenever the Attorney General receives information sufficient to constitute grounds to investigate that any person not described in subsection (b) of this section has committed a violation of any Federal criminal law other than a violation constituting a petty offense, the Attorney General may conduct an investigation and apply for an independent counsel pursuant to the provisions of this chapter if the Attorney General determines that investigation of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

[§ 592. Application for appointment of an independent counsel

[(a)(1) Upon receiving information that the Attorney General determines is sufficient to constitute grounds to investigate that any person covered by the Act has engaged in conduct described in subsection (a) or (c) of section 591 of this title, the Attorney General shall conduct, for a period not to exceed ninety days, such preliminary investigation of the matter as the Attorney General deems appropriate. In determining whether grounds to investigate exist, the Attorney General shall consider—

[(A) the degree of specificity of the information received, and

[(B) the credibility of the source of the information.

[(2) In conducting preliminary investigations pursuant to this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

[(b)(1) If the Attorney General, upon completion of the preliminary investigation, finds that there are no reasonable grounds to believe that further investigation or prosecution is warranted, the Attorney General shall so notify the division of the court specified in section 593(a) of this title, and the division of the court shall have no power to appoint an independent counsel.

[(2) Such notification shall be by memorandum containing a summary of the information received and a summary of the results of any preliminary investigation.

[(3) Such memorandum shall not be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

[(c)(1) If the Attorney General, upon completion of the preliminary investigation, finds reasonable grounds to believe that further investigation or prosecution is warranted, or if ninety days elapse from the receipt of the information without a determination by the Attorney General that there are no reasonable grounds to believe that further investigation or prosecution is warranted, then the Attorney General shall apply to the division of the court for the appointment of an independent counsel.

In determining whether reasonable grounds exist to warrant further investigation or prosecution, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

[(2) If—

[(A) after the filing of a memorandum under subsection (b) of this section, the Attorney General receives additional information sufficient to constitute grounds to investigate about the matter to which such memorandum related, and

[(B) the Attorney General determines, after such additional investigation as the Attorney General deems appropriate, that reasonable grounds exist to warrant further investigation or prosecution,

then the Attorney General shall, not later than ninety days after receiving such additional information, apply to the division of the court for the appointment of an independent counsel.

[(d)(1) Any application under this chapter shall contain sufficient information to assist the division of the court to select an independent counsel and to define that independent counsel's prosecutorial jurisdiction.

[(2) No application or any other documents, materials, or memorandums supplied to the division of the court under this chapter shall be revealed to any individual outside the division of the court or the Department of Justice without leave of the division of the court.

[(e) The Attorney General may ask an independent counsel to accept referral of a matter that relates to a matter within that independent counsel's prosecutorial jurisdiction.

[(f) The Attorney General's determination under subsection (c) of this section to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.

[§ 593. Duties of the division of the court

[(a) The division of the court to which this chapter refers is the division established under section 49 of this title.

[(b) Upon receipt of an application under section 592(c) of this title, the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. An independent counsel's identity and prosecutorial jurisdiction shall be made public upon request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned or any criminal information is filed.

[(c) The division of the court, upon request of the Attorney General which may be incorporated in an application under this chapter, may expand the prosecutorial jurisdiction of an existing independent counsel, and such expansion may be in lieu of the appointment of an additional independent counsel.

[(d) The division of the court may not appoint as an independent counsel any person who holds or recently held any office of profit or trust under the United States.

[(e) If a vacancy in office arises by reason of the resignation or death of an independent counsel, the division of the court may appoint an independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

[(f) Upon a showing of good cause by the Attorney General, the division of the court may grant a single extension of the preliminary investigation conducted pursuant to section 592(a) of this title for a period not to exceed sixty days.

[(g) Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the attorney's fees incurred by such subject during such investigation if—

[(1) no indictment is brought against such subject; and

[(2) the attorney's fees would not have been incurred but for the requirements of this chapter.

[§ 594. Authority and duties of an independent counsel

[(a) Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those

matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

[(1) conducting proceedings before grand juries and other investigations;

[(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel deems necessary;

[(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

[(4) reviewing all documentary evidence available from any source;

[(5) determining whether to contest the assertion of any testimonial privilege;

[(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

[(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

[(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1954, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

[(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

[(10) consulting with the United States Attorney for the district in which the violation was alleged to have occurred.

[(b) An independent counsel appointed under this chapter shall receive compensation at a per diem rate equal to the annual rate of basic pay for level IV of the Executive Schedule under section 5315 of title 5.

[(c) For the purposes of carrying out the duties of the office of independent counsel, an independent counsel shall have power to appoint, fix the compensation, and assign the duties, of such employees as such independent counsel deems necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate provided for GS-18 of the General Schedule under section 5332 of title 5.

[(d) An independent counsel may request assistance from the Department of Justice, and the Department of Justice shall provide that assistance, which may include access to any records, files, or

other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

[(e) An independent counsel may ask the Attorney General or the division of the court to refer matters related to the independent counsel's prosecutorial jurisdiction. An independent counsel may accept referral of a matter by the Attorney General, if the matter relates to a matter within such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such a referral is accepted, the independent counsel shall notify the division of the court.

[(f) An independent counsel shall, except where not possible, comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

[(g) The independent counsel shall have full authority to dismiss matters within his prosecutorial jurisdiction without conducting an investigation or at any subsequent time prior to prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

[§ 595. Reporting and congressional oversight

[(a) An independent counsel appointed under this chapter may make public from time to time, and shall send to the Congress statements or reports on the activities of such independent counsel. These statements and reports shall contain such information as such independent counsel deems appropriate.

[(b)(1) In addition to any reports made under subsection (a) of this section, and before the termination of an independent counsel's office under section 596(b) of this title, such independent counsel shall submit to the division of the court a report under this subsection.

[(2) A report under this subsection shall set forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel which was not prosecuted.

[(3) The division of the court may release to the Congress, the public, or to any appropriate person, such portions of a report made under this subsection as the division deems appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of such division be included as an appendix to such report.

[(c) An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall

prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

[(d) The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

[(e) A majority of majority party members or a majority of all non-majority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General apply for the appointment of an independent counsel. Not later than thirty days after the receipt of such a request, or not later than fifteen days after the completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such notification as will not in the committee's judgment prejudice the rights of any individual.

[§ 596. Removal of an independent counsel; termination of office

[(a)(1) An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties.

[(2) If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, delete or postpone publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a report released under section 595(b)(3) of this title and under the same limitations as apply to the release of a report under that section.

[(3) An independent counsel so removed may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief. The division of the court shall cause such an action to be in every way expedited.

[(b)(1) An office of independent counsel shall terminate when (A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of

such independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions and (B) the independent counsel files a report in full compliance with section 595(b) of this title.

[(2) The division of the court, either on its own motion or upon suggestion of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e) of this title, and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the report required by section 595(b) of this title.

[§ 597. Relationship with Department of Justice

[(a) Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e) of this title, the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d) of this title, and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

[(b) Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as *amicus curiae* to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

[§ 598. Termination of effect of chapter

[This chapter shall cease to have effect five years after the date of the enactment of the Ethics in Government Act Amendments of 1982, except that this chapter shall continue in effect with respect to then pending matters before an independent counsel that in the judgment of such independent counsel require such continuation until that independent counsel determines such matters have been completed.]

CHAPTER 40—INDEPENDENT COUNSEL

Sec.

591. Applicability of provisions of this chapter.

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§ 591. Applicability of provisions of this chapter

(a) WHEN PRELIMINARY INVESTIGATION REQUIRED.—

(1) **RECEIPT OF INFORMATION.**—The Attorney General shall conduct a preliminary investigation in accordance with section 5312 whenever the Attorney General receives information sufficient to constitute grounds to investigate whether any person described in subsection (b) may have violated any Federal criminal law other than a petty offense.

(2) **EXAMINATION OF INFORMATION TO DETERMINE NEED FOR PRELIMINARY INVESTIGATION.**—In determining under paragraph (1) if grounds to investigate exist, the Attorney General shall consider only—

(A) the specificity of the information received, and

(B) the credibility of the source of the information.

If the Attorney General determines that the information is insufficient to constitute grounds to investigate the matters involved, no court may order the Attorney General to conduct a preliminary investigation of such matters under this chapter.

(3) **WRITTEN REPORT IF NO DETERMINATION WITHIN 30 DAYS.**—If the Attorney General fails to decide whether to conduct a preliminary investigation within 30 days after the receipt of information under this chapter and the Attorney General later determines not to conduct a preliminary investigation, the Attorney General shall file a written report with the division of the court not more than 90 days after the date the information is received, describing the actions taken with respect to the information and explaining the basis for the determination not to conduct a preliminary investigation.

(b) **PERSONS SUBJECT TO THIS CHAPTER.**—The persons referred to in subsection (a)(1) are—

(1) the President and Vice President

(2) any individual serving in a position listed in section 5312 of title 5;

(3) any individual working in the Executive Office of the President who is compensated at a rate of pay specified in or fixed according to level II of the Executive Schedule under section 5313 of title 5, or a comparable or greater rate of pay under other authority;

(4) the Attorney General, any Assistant Attorney General, and any individual in the Department of Justice who is compensated at a rate of pay at or above level III of the Executive Schedule under section 5316 of title 5;

(5) the Director of Central Intelligence, the Deputy Director of Central Intelligence, and the Commissioner of Internal Revenue;

(6) any individual who held any office or position described in any of paragraphs (1) through (5) of this subsection, during the period consisting of the incumbency of the President under whom such individual served in the office or position plus 1 year after such incumbency, but in no event longer than 5 years after the individual leaves office;

(7) any individual who holds an office or position described in any of paragraphs (1) through (5) of this subsection during the incumbency of one President and who continues to hold the office or position for not more than 90 days into the term of the next President, during the period such individual serves in the

office or position plus 1 year after the individual leaves the office or position;

(8) any officer of a campaign for the election or re-election of the President, including a campaign by a national political party, if that officer exercises authority at the national level—

(A) during the period of the campaign; and

(B) during the incumbency of the President, if the candidate is elected or re-elected President; and

(9) any other person if the Attorney General determines that investigation or prosecution of such person by the Attorney General or other officer of the Department of Justice may result in a personal, financial, or political conflict of interest.

(c) RECUSAL OF THE ATTORNEY GENERAL.—

(1) **WHEN RECUSAL IS REQUIRED.**—If information received under this chapter involves a person described in subsection (b)(4) or a person with whom the Attorney General has a current or recent personal or financial relationship, the Attorney General shall designate the United States Attorney for the District of Columbia to perform the duties assigned under this chapter to the Attorney General with respect to that information. If the United States Attorney for the District of Columbia is disqualified from the matter due to a personal or financial conflict of interest, the Attorney General shall designate another appropriate official of the Department of Justice to perform such duties.

(2) **RECUSAL DETERMINATION MUST BE IN WRITING.**—Prior to making other determinations required by this chapter with respect to information received under this chapter, the Attorney General shall determine in accordance with paragraph (1) whether to designate another official to perform the duties assigned by this chapter. This determination shall be in writing, shall identify the facts considered by the Attorney General, and shall explain the reasons for the decision. The Attorney General shall file this determination with any notification or application submitted to the division of the court under section 592 or 594.

§ 592. Preliminary investigation and application for an independent counsel

(a) CONDUCT OF PRELIMINARY INVESTIGATION.—

(1) **IN GENERAL.**—A preliminary investigation conducted pursuant to a determination made under section 591(a) shall be of such matters as the Attorney General considers appropriate in order to make the determinations specified in subsections (b) and (c) of this section. The preliminary investigation shall be conducted for a period of not more than 90 days after the date the information referred to in section 591(a) is received.

(2) **CONGRESSIONAL REQUEST FOR PRELIMINARY INVESTIGATION OR APPOINTMENT OF AN INDEPENDENT COUNSEL.**—A majority of majority party members or a majority of all nonmajority party members of the Committee on the Judiciary of either House of the Congress may request in writing that the Attorney General conduct a preliminary investigation or apply for the appointment of an independent counsel. Not later than 30 days after the receipt of such a request, or not later than 15 days after the

completion of a preliminary investigation of the matter with respect to which the request is made, whichever is later, the Attorney General shall provide written notification of any action the Attorney General has taken in response to such request and, if no application has been made to the division of the court, why such application was not made. Such written notification shall be provided to the committee on which the persons making the request serve, and shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, disclose such portion or portions of such notification which will not, in the committee's judgment, prejudice the rights of any individual.

(3) **LIMITED AUTHORITY OF ATTORNEY GENERAL.**—(A) In conducting preliminary investigations under this section, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.

(B) The Attorney General shall not, in whole or in part, base a decision—

(i) not to conduct a preliminary investigation; or

(ii) not to apply for the appointment of an independent counsel,

upon a determination that the person who is the subject of the preliminary investigation lacked the state of mind required for the violation of criminal law involved if there is conflicting or inconclusive evidence of the state of mind of such person.

(4) **EXTENSION OF TIME FOR PRELIMINARY INVESTIGATION.**—The Attorney General may apply to the division of the court for a single extension (for a period of not more than 60 days) of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

(b) **FINDING THAT FURTHER INVESTIGATION NOT WARRANTED.**—

(1) **NOTIFICATION TO COURT.**—If the Attorney General, upon completion of a preliminary investigation under this section, finds that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court, and the division of the court shall have no power to appoint an independent counsel with respect to the matters involved.

(2) **FORM OF NOTIFICATION.**—Such notification shall contain a summary of the information received and a summary of the results of the preliminary investigation.

(c) **FINDING THAT FURTHER INVESTIGATION IS WARRANTED.**—

(1) **APPLICATION FOR APPOINTMENT OF INDEPENDENT COUNSEL.**—The Attorney General shall apply to the division of the court for the appointment of an independent counsel if—

(A) the Attorney General, upon completion of a preliminary investigation, finds reasonable grounds to believe that further investigation is warranted, or

(B) the 90-day period referred to in subsection (a)(1) (and any extension granted under subsection (a)(4)) elapses without a notification under subsection (b) by the Attorney General to the division of the court that there are no reasonable grounds to believe that further investigation is warranted.

In determining whether reasonable grounds exist to warrant further investigation the Attorney General shall comply with the written or other established policies of the Department of Justice which pertain to the conduct of criminal investigations.

(2) **RECEIPT OF ADDITIONAL INFORMATION.**—*If, after submitting a notification under subsection (b), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall—*

(A) *conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date such additional information is received; and*

(B) *otherwise comply with the provisions of this section and section 594(e).*

(d) **CONTENTS OF APPLICATION.**—*Any application under this chapter shall contain sufficient information to assist the division of the court to select an independent counsel and to define that independent counsel's prosecutorial jurisdiction.*

(e) **LIMITATION ON JUDICIAL REVIEW.**—*The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.*

§ 593. Duties of the division of the court

(a) **REFERENCE TO DIVISION OF THE COURT.**—*The division of the court to which this chapter refers is the division established under section 49 of this title.*

(b) **APPOINTMENT AND JURISDICTION OF INDEPENDENT COUNSEL.**—*Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction. Before determining such jurisdiction, the division of the court may consider comments submitted by interested persons with respect to such jurisdiction. An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (d)) shall not be made public except upon the request of the Attorney General or upon a determination of the division of the court, on its own motion or on the motion of an interested person, that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned or any criminal information is filed.*

(c) **SCOPE OF JURISDICTION OF INDEPENDENT COUNSEL.**—*In defining the prosecutorial jurisdiction of an independent counsel appointed under this chapter, the division of the court shall include the authority to investigate and prosecute such Federal crimes, other than petty offenses, as may arise out of the investigation or prosecution itself, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.*

(d) **EXPANSION OF JURISDICTION.**—*The division of the court, upon request of the Attorney General, may expand the prosecutorial juris-*

diction of an independent counsel and such expansion may be in lieu of the appointment of a new independent counsel.

(e) **REMAND FOR FURTHER EXPLANATION.**—Upon receipt of a notification under section 592 or 594 from the Attorney General finding that there are no reasonable grounds to believe that further investigation is warranted of information received under this chapter, the division of the court shall have no authority to overrule this determination but may remand the matter to the Attorney General for further explanation of the reasons for such finding.

(f) **QUALIFICATIONS OF INDEPENDENT COUNSEL.**—The division of the court shall appoint as independent counsel, an individual who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

(g) **VACANCIES.**—If a vacancy in office arises by reason of the resignation or death of an independent counsel, the division of the court may appoint an independent counsel to complete the work of the independent counsel whose resignation or death caused the vacancy. If a vacancy in office arises by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed. Upon the completion of such judicial review, the division of the court shall take appropriate action.

(h) **PAYMENT OF ATTORNEY FEES.**—

(1) **AWARD OF FEES.**—Upon request by the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, in its discretion, award reimbursement for all or part of the reasonable attorney fees incurred by such subject during such investigation if—

(A) no indictment is brought against such subject; and

(B) the attorney fees would not have been incurred but for the requirements of this chapter.

(2) **CALCULATING FEES.**—In calculating attorney fees under this subsection, the hourly rate awarded to a defense counsel may not exceed the hourly rate received by the independent counsel.

(3) **EVALUATION OF FEES.**—The division of the court may direct the Attorney General to file a written evaluation of any request for attorney fees under this subsection, analyzing for each expense—

(A) the sufficiency of the documentation;

(B) the need or justification for the underlying item; and

(C) the reasonableness of the amount of money requested.

(i) **DISCLOSURE OF INFORMATION.**—Except as otherwise provided in this chapter, documents or materials supplied to the division of the court under this chapter shall not be revealed to any individual outside the division of the court without leave of the division of the court. Any person may request the court to release any such documents or materials. The division of the court shall give special consideration to requests made by a committee of the Congress exercising a responsibility to oversee the independent counsel process.

(j) *AMICUS CURIAE BRIEFS*.—When presented with important legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely *amicus curiae* briefs.

§ 594. Authority and duties of an independent counsel

(a) *AUTHORITY*.—Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include—

(1) conducting proceedings before grand juries and other investigations;

(2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;

(3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;

(4) reviewing all documentary evidence available from any source;

(5) determining whether to contest the assertion of any testimonial privilege;

(6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;

(7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants, subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

(8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986, and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

(9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case in the name of the United States; and

(10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

(b) *COMPENSATION*.—An independent counsel appointed under this chapter shall receive compensation at a *per diem* rate equal to the

annual rate of basic pay payable for level IV of the Executive Schedule under section 5315 of title 5.

(c) **ADDITIONAL PERSONNEL.**—For the purposes of carrying out the duties of the office of independent counsel, an independent counsel may appoint, fix the compensation, and assign the duties of such employees as such independent counsel considers necessary (including investigators, attorneys, and part-time consultants). The positions of all such employees are exempted from the competitive service. No such employee may be compensated at a rate exceeding the maximum rate of pay payable for GS-18 of the General Schedule under section 5332 of title 5.

(d) **ASSISTANCE OF DEPARTMENT OF JUSTICE.**—An independent counsel may request assistance from the Department of Justice in carrying out the functions of the independent counsel, and the Department of Justice shall provide that assistance, which may include access to any records, fees, or other materials relevant to matters within such independent counsel's prosecutorial jurisdiction, and the use of the resources and personnel necessary to perform such independent counsel's duties.

(e) **OTHER MATTERS WHICH MAY BE REFERRED TO AN INDEPENDENT COUNSEL.**—

(1) **TREATMENT OF MATTERS NOT COVERED IN PROSECUTORIAL JURISDICTION.**—(A) If the independent counsel discovers or receives information about persons or possible violations of criminal law as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

(B) If the Attorney General finds, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint a new independent counsel with respect to the matters involved.

(C) If—

(i) the Attorney General finds there are reasonable grounds to believe that further investigation is warranted; or

(ii) the 30-day period referred to in subparagraph (A) elapses without a modification to the division of the court that no further investigation is warranted, the division of the court shall expand the jurisdiction of the appropriate independent counsel or appoint a new independent counsel to investigate the matters involved.

(2) **REFERRALS BY THE ATTORNEY GENERAL.**—An independent counsel may accept referral of a matter by the Attorney General,

if the matter relates to such independent counsel's prosecutorial jurisdiction as established by the division of the court. If such referral is accepted, the independent counsel shall notify the division of the court.

(f) **COMPLIANCE WITH DEPARTMENT OF JUSTICE POLICIES**.—An independent counsel shall comply with the written or other established policies of the Department of Justice respecting enforcement of the criminal laws.

(g) **DISMISSAL OF MATTERS**.—The independent counsel shall have full authority to dismiss matters within such counsel's prosecutorial jurisdiction without conducting an investigation or at any subsequent time before prosecution if to do so would be consistent with the written or other established policies of the Department of Justice with respect to the enforcement of criminal laws.

(h) **TREATMENT OF NONCRIMINAL ETHICAL VIOLATIONS**.—If the criminal investigation conducted by an independent counsel incidentally develops or discovers evidence warranting investigation of whether the subject or subjects of proceedings under this chapter may have violated ethical standards established by Federal law or regulation, but no criminal prosecution is warranted, the independent counsel may report such evidence to the Office of Government Ethics and any other Federal agency or officer having jurisdiction over such noncriminal violations.

(i) **REPORTS BY INDEPENDENT COUNSEL**.—

(1) **REQUIRED REPORTS**.—An independent counsel shall—

(A) within 30 days after appointment file an initial report with the division of the court estimating the length of the investigation, staff needs, and expenses;

(B) file a status report with the division of the court every 60 days after the initial report, identifying and explaining major unexpected expenses, and estimating the length of the remainder of the investigation, staff needs, and expenses; and

(C) before the termination of an independent counsel's office under section 596(b), file a final report with the division of the court, setting forth fully and completely a description of the work of the independent counsel, including the disposition of all cases brought, and the reasons for not prosecuting any matter within the prosecutorial jurisdiction of such independent counsel.

(2) **RELEASE OF INFORMATION IN REPORT**.—The division of the court may release to the Congress or any person such portions of a report made under this subsection as the division considers appropriate. The division of the court shall make such orders as are appropriate to protect the rights of any individual named in such report and to prevent undue interference with any pending prosecution. The division of the court may make any portion of a final report under this section available to any individual named in such report for the purposes of receiving within a time limit set by the division of the court any comments or factual information that such individual may submit. Such comments and factual information, in whole or in part, may in the discretion of the division of the court be included as an appendix to such final report.

(j) **INFORMATION RELATING TO IMPEACHMENT.**—An independent counsel shall advise the House of Representatives of any substantial and credible information which such independent counsel receives, in carrying out the independent counsel's responsibilities under this chapter, that may constitute grounds for an impeachment. Nothing in this chapter or section 49 of this title shall prevent the Congress or either House thereof from obtaining information in the course of an impeachment proceeding.

(k) **RECORDKEEPING.**—

(1) **INDEPENDENT COUNSEL RECORDS.**—Upon termination of office, an independent counsel shall transfer to the Archivist of the United States records which have been created or received by the independent counsel office. Prior to this transfer, the independent counsel shall clearly identify which of these records are subject to rule 6(e) of the Federal Rules of Criminal Procedure as grand jury materials and which have been classified as national security information. Any records which were compiled by an independent counsel and, upon termination of the independent counsel's office, were stored with the division of the court or elsewhere prior to the enactment of this section, shall also be transferred to the Archivist of the United States by the division of the court or the person in possession of such records.

(2) **RECORDS SUBJECT TO FEDERAL RECORDS ACT.**—Records transferred to the Archivist under this chapter shall be maintained, used, and disposed of in accordance with the Federal Records Act (chapters 21, 29, and 33 of title 44, United States Code).

(3) **ACCESS TO RECORDS.**—Access to the records transferred to the Archivist under this chapter shall be governed by the Freedom of Information Act (5 U.S.C. 552). Upon written application by the Attorney General, the Archivist shall disclose independent counsel records to the Department of Justice for purposes of an ongoing law enforcement investigation or court proceeding or, in the case of grand jury materials, as permitted by rule 6(e) of the Federal Rules of Criminal Procedure. Notwithstanding any restriction on access imposed by law, the Archivist and persons employed by the National Archives and Records Administration who are engaged in the performance of normal archival work shall be permitted access to the records transferred to the Archivist under this chapter.

(l) **STANDARDS OF CONDUCT APPLICABLE TO INDEPENDENT COUNSELS AND PERSONS SERVING IN THE OFFICE OF AN INDEPENDENT COUNSEL.**—

(1) **INDEPENDENCE FROM DEPARTMENT OF JUSTICE.**—Each independent counsel, together with the persons appointed by the independent counsel under subsection (c), form an agency separate from and independent of the Department of Justice for purposes of sections 202 through 209 in title 18.

(2) **RESTRICTIONS ON EMPLOYMENT WHILE SERVING.**—During the term of office of an independent counsel, such independent counsel and the persons appointed by the independent counsel under subsection (c), shall not simultaneously—

(A) serve as counsel or cocounsel to a person who is subject to any proceedings under this chapter; or

(B) accept or hold any office or position of trust with the United States.

(3) **FIVE-YEAR BAN ON REPRESENTATION OF SUBJECTS.**—Each independent counsel and the persons appointed by the independent counsel under subsection (c) shall not, for 5 years following the termination of that independent counsel's office, represent any person, in any civil or criminal matter, who was a subject of an investigation or prosecution under this chapter if those proceedings were conducted by that independent counsel.

(4) **EFFECTIVE DATE OF STANDARDS OF CONDUCT.**—Independent counsels and persons appointed by independent counsels under subsection (c), who are serving in such capacities on the date of the enactment of this chapter, shall be exempt from paragraph (2)(B) during their current terms of office but shall comply with all other provisions of this subsection no later than 90 days after the date of enactment of this chapter.

(m) **EXPENDITURES.**—Independent counsels shall conduct their investigations and prosecutions with due regard for expense and shall authorize only reasonable expenditures.

§ 595. Congressional oversight

(a) **OVERSIGHT OF CONDUCT OF INDEPENDENT COUNSELS.**—

(1) **CONGRESSIONAL OVERSIGHT.**—The appropriate committees of the Congress shall have oversight jurisdiction with respect to the official conduct of any independent counsel appointed under this chapter, and such independent counsel shall have the duty to cooperate with the exercise of such oversight jurisdiction.

(2) **REPORTS TO CONGRESS BY AN INDEPENDENT COUNSEL.**—An independent counsel appointed under this chapter shall submit to the Congress such statements or reports on the activities of such independent counsel as the independent counsel considers appropriate.

(b) **OVERSIGHT OF CONDUCT OF ATTORNEY GENERAL.**—

(1) **CONGRESSIONAL REQUEST FOR INFORMATION.**—Upon receiving an inquiry about a particular case, which has become public, from a committee of the Congress with jurisdiction over this chapter, the Attorney General shall promptly respond to the inquiry—

(A) by indicating at least the following about such case:

(i) whether proceedings are taking place under this chapter with respect to that case;

(ii) when the information about the case was received for purposes of calculating the 90-day period under section 592 or 30-day period under section 594;

(iii) whether a preliminary investigation has been initiated;

(iv) whether the Attorney General has determined not to initiate a preliminary investigation; and

(v) whether an initial filing has been made with the division of the court with respect to that case and, if so, the date of that filing; and

(B) by producing documents from the case if that case has been closed by the Department of Justice and if the

documents discuss determinations required by this chapter, other than court filings which the division of the court has not released.

(2) *DISCLOSURE BY COMMITTEE.*—A committee which obtains a response or documents from the Attorney General under this subsection may not disclose such response or documents unless the committee determines that disclosure will not, in the judgment of the committee, prejudice the rights of any individual.

§ 596. Removal of an independent counsel; termination of office

(a) REMOVAL; REPORT ON REMOVAL.—

(1) *GROUND FOR REMOVAL.*—An independent counsel appointed under this chapter may be removed from office, other than by impeachment and conviction, only by the personal action of the Attorney General and only for cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel's duties. For purposes of this paragraph, refusal of an independent counsel to obey an order of the President is not good cause for removal if that order would compromise the independence of proceedings under this chapter or otherwise violate the purposes of this chapter.

(2) *REPORT TO DIVISION OF THE COURT AND CONGRESS.*—If an independent counsel is removed from office, the Attorney General shall promptly submit to the division of the court and the Committees on the Judiciary of the Senate and the House of Representatives a report specifying the facts found and the ultimate grounds for such removal. The committees shall make available to the public such report, except that each committee may, if necessary to protect the rights of any individual named in the report or to prevent undue interference with any pending prosecution, postpone or refrain from publishing any or all of the report. The division of the court may release any or all of such report in the same manner as a final report released under section 594(i)(2) and under the same limitations as apply to the release of a final report under that section.

(3) *JUDICIAL REVIEW OF REMOVAL.*—An independent counsel removed from office may obtain judicial review of the removal in a civil action commenced before the division of the court and, if such removal was based on error of law or fact, may obtain reinstatement or other appropriate relief.

(b) TERMINATION OF OFFICE.—

(1) *TERMINATION BY ACTION OF INDEPENDENT COUNSEL.*—An office of independent counsel shall terminate when—

(A) the independent counsel notifies the Attorney General that the investigation of all matters within the prosecutorial jurisdiction of such independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions, and

(B) the independent counsel files a final report in compliance with section 594(i)(1)(C).

(2) *TERMINATION BY DIVISION OF THE COURT.*—The division of the court, either on its own motion or upon the request of the Attorney General, may terminate an office of independent counsel at any time, on the ground that the investigation of all matters within the prosecutorial jurisdiction of the independent counsel or accepted by such independent counsel under section 594(e), and any resulting prosecutions, have been completed or so substantially completed that it would be appropriate for the Department of Justice to complete such investigations and prosecutions. At the time of termination, the independent counsel shall file the final report required by section 594(i)(1)(C).

§ 597. Relationship with Department of Justice

“(a) *SUSPENSION OF OTHER INVESTIGATIONS AND PROCEEDINGS; RESOLUTION OF DISPUTES.*—Whenever a matter is in the prosecutorial jurisdiction of an independent counsel or has been accepted by an independent counsel under section 594(e), the Department of Justice, the Attorney General, and all other officers and employees of the Department of Justice shall suspend all investigations and proceedings regarding such matter, except to the extent required by section 594(d), and except insofar as such independent counsel agrees in writing that such investigation or proceedings may be continued by the Department of Justice.

(b) *PRESENTATION AS AMICUS CURIAE PERMITTED.*—Nothing in this chapter shall prevent the Attorney General or the Solicitor General from making a presentation as amicus curiae to any court as to issues of law raised by any case or proceeding in which an independent counsel participates in an official capacity or any appeal of such a case or proceeding.

§ 598. Severability

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

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TITLE 18—CRIMES AND CRIMINAL PROCEDURE

§ 202. Definitions

(a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term “special Government employee” shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis, a part-time United States commissioner, [or] a part-time United States magistrate[.], or, regardless of the number of days of appointment, an

independent counsel appointed under chapter 40 of title 28, together with any persons appointed by that independent counsel under section 594(c) of title 28.

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SEC. 203. (b) The President [and the Vice President], the Vice President, and independent counsels and other persons appointed under chapter 40 of title 28 shall file reports required under this title with the Director of the Office of Government Ethics.

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